



San Francisco Law Library

436 CITY HALL

No. 144105

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

261X
No. 12430

United States
Court of Appeals

For the Ninth Circuit.

WILLIAM PATRICK BRANDHOVE,
Appellant,
vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES, a California legislative
committee; HUGH M. BURNS; NELSON S.
DILWORTH; FRED H. KRAFT; LOUIS G.
SUTTON, CLYDE A. WATSON and ELMER
E. ROBINSON,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED
FEB 3 1950

PAUL P. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK

No. 12430

United States
Court of Appeals
For the Ninth Circuit.

WILLIAM PATRICK BRANDHOVE,
Appellant,
vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES, a California legislative
committee; HUGH M. BURNS; NELSON S.
DILWORTH; FRED H. KRAFT; LOUIS G.
SUTTON, CLYDE A. WATSON and ELMER
E. ROBINSON,
Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk (DC) to Record on... 128

Notice of..... 126

Complaint for Damages Under Civil Rights

Act 3

Exhibit "A"—California Senate Resolution No. 75..... 12

Exhibit "B"—Protest of William Patrick Brandhove 18

Exhibit "C"—Subpoena to William Patrick Brandhove..... 22

Exhibit "D"—Copy of Telegram to Edmund G. Brown..... 23

Exhibit "E"—Copy of Telegram to J. Frank Coakley..... 25

Exhibit "F"—Proceedings Before Senate Fact Finding Committee Dated 1/29/49..... 26

Examination of William Patrick Maher Brandhove..... 28

INDEX

PAGE

Exhibit "F"—(Continued)

Examination of Marvin A. Jarvis.....	48
Examination of Mayor Elmer E. Robinson	50
Designation of Record on Appeal and Statement of Points.....	131
Judgment on Motions to Dismiss.....	125
Memorandum of Authorities Supplementing Oral Arguments on Motion to Dismiss....	86, 97
Motion to Dismiss Complaint.....	76, 89
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	126
Notice of Hearing on Motion to Dismiss.....	85
Order re Motion to Dismiss.....	124
Plaintiff's Memorandum of Points and Authorities in Support of Denial of Defendants' Motion to Dismiss Complaint.....	110
Statement of Appellant on Appeal on Which He Intends to Rely.....	127
Supplemental Memorandum of Defendant Elmer E. Robinson.....	122

NAMES AND ADDRESSES OF ATTORNEYS

MARTIN J. JARVIS,

RICHARD O. GRAW,

1002 de Young Building, San Francisco, Calif.

ELMER P. DELANY,

400 Grant Building, San Francisco, Calif.

Attorneys for Plaintiff and Appellant.

HAROLD C. FAULKNER,

MELVIN, FAULKNER, SHEEHAN &
WISEMAN,

1101 Balfour Building, San Francisco, Calif.

F. N. HOWSER,

Attorney General of the State of California.

J. FRANCIS O'SHEA,

Asst. Attorney General of the State of Calif.,
Library and Courts Building,
Sacramento, California.

FRED B. WOOD,

995 Market Street, San Francisco, Calif.

Attorneys for Defendants and Appellees
other than Elmer E. Robinson.

W. A. LAHANIER,

McGUIRE and LAHANIER,

2 Pine Street, San Francisco, Calif.

Attorney for Defendant and Appellee
Elmer E. Robinson.

United States District Court for the Northern
District of California, Southern Division

No. 28711H

WILLIAM PATRICK BRANDHOVE,
Plaintiff,

vs.

JACK B. TENNEY; THE SENATE FACT
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES, a California legislative
committee; HUGH M. BURNS; NELSON S.
DILWORTH; FRED H. KRAFT; LOUIS G.
SUTTON; CLYDE A. WATSON; and EL-
MER E. ROBINSON,

Defendants.

COMPLAINT FOR DAMAGES UNDER
CIVIL RIGHTS ACT

Plaintiff complains of Defendants, and each of
them, and for cause of action alleges:

1. The Action arises under the 14th Amendment
to the Constitution of the United States, section 1,
and under R.S. section 1979, U.S.C. Title 8, section
43, and under R.S. section 1980, U.S.C. Title 8, sec-
tion 47 (3), and under sections 19 and 20 U.S.
Criminal code, U.S.C. Title 18, sections 51 and 52.

2. Plaintiff is a citizen of the United States and
of the State of California; defendant the Senate
Fact-Finding Committee on Un-American Activi-
ties is a legislative committee duly created under

the constitution of the State of California by California Senate Resolution No. 75, June 20, 1947, a copy of which resolution is marked Exhibit "A" attached hereto, referred to, incorporated in and made a part hereof by this reference; defendant Jack B. Tenney is, and at all times mentioned herein was the duly appointed chairman of said legislative committee, hereinafter called The Tenney Committee; defendants Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton and Clyde A. Watson, and each of them, are, and at all times hereinafter mentioned were duly appointed members of The Tenney Committee.

3. On January 28, 1949, plaintiff circulated a petition entitled: "A Protest Against a renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)" among the members of the Legislature of the State of California at the State Capitol in Sacramento. A copy of said petition is marked Exhibit "B," attached hereto, referred to, incorporated in and made a part hereof by this reference. The subject matter of said petition was stated therein as follows:

"I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an instrument to smear Congressman Franck R. Havenner as a "Red" when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck

Havenner's opponent, conspired with the Tenney Committee to this end."

and the purpose of said petition, as also stated therein, was that the California Legislature should not appropriate further funds for The Tenney Committee. While plaintiff was engaged in circulating said petition as aforesaid for approximately a period of two (2) hours, a subpoena was served upon him ordering him to appear as a witness at a hearing before The Tenney Committee in Sacramento, California, on the following day, to wit: January 29, 1949. Said subpoena did not refer to or state the purpose or object of said hearing or refer to or state the purpose or object of plaintiff's required testimony thereat. A copy of said subpoena is marked Exhibit "C," attached hereto, referred to, incorporated herein and made a part hereof by this reference.

4. On January 28, 1949, before the service of said subpoena on plaintiff, and after the content of said circulated petition had become known to defendant Jack B. Tenney, said defendant immediately communicated by telephone with defendant Elmer E. Robinson advising him of the charges contained in said petition and the stated purpose of same; then and there said defendants Jack B. Tenney and Elmer E. Robinson discussed ways and means of best thwarting the charges contained in said petition and defeating the purpose stated in said petition and agreed that a hearing should be held on the following day by The Tenney Committee whereat defend-

ant Elmer E. Robinson should appear as a voluntary witness and deny the truth of the charges with reference to him and his connection with the Tenney Committee contained in said circulated petition.

5. On the same day, to wit: January 28, 1949, after the circulating of said petition, defendants Jack B. Tenney and Hugh M. Burns, by telegrams to the District Attorneys of the City and County of San Francisco and the County of Alameda, State of California, signed by them as chairman and vice chairman of The Tenney Committee and acting on behalf of said committee demanded of each of said District Attorneys: "to either immediately charge Brandhove (plaintiff) with perjury or to take the matter before the San Francisco (Alameda) grand jury." Copies of said telegrams are marked Exhibit "D" and Exhibit "E" respectively, attached hereto, referred to, incorporated in and made a part hereof by this reference.

6. Pursuant to said subpoena plaintiff appeared before The Tenney Committee on the 29th day of January, 1949 and on that day a hearing was held by said committee. At said hearing defendant Elmer E. Robinson appeared as a voluntary witness. At said hearing all individual defendants except defendant Elmer E. Robinson, were sitting as members of the Tenney Committee.

7. Said hearing of The Tenney Committee on January 29, 1949, was held, as was known to all defendants, for the purpose and object of suppressing

the criticism of plaintiff in his circulated petition and the charges therein directed against The Tenney Committee and the individual defendants, to the end that said committee should obtain the appropriation of funds requested from the California Legislature.

8. In pursuance of said end The Tenney Committee and its members acted as judges and accused in the same cause at said hearing and held and conducted the same in an unfair, partial and unlawful manner. At said hearing defendant Elmer E. Robinson was permitted to and did make a lengthy unsworn statement first, and after having been sworn as a voluntary witness, was led by defendant Jack B. Tenney to and did answer the different charges contained in plaintiff's said petition whereby unbridled discretion was left to said defendant Elmer E. Robinson in the conduct of his self-justification. At said hearing specific questions were directed to plaintiff with regard to his personal affairs and acquaintances to which The Tenney Committee previously had obtained sworn answers from plaintiff. At said hearing defendant Jack B. Tenney read into the record of the hearing a false alleged criminal record of plaintiff and a newspaper article wherein an affidavit of plaintiff was called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee to defendant Jack B. Tenney "that Mr. Brandhove (plaintiff) was a liar." At said hearing plaintiff's counsel, although he was not summoned by The Tenney

Committee to appear at said hearing but was present thereat solely in his professional capacity as plaintiff's attorney, was called as a witness by said committee and interrogated at length about his private affairs, and when plaintiff's said counsel referred to decisions of the United States Supreme Court supporting the objections raised by plaintiff against said hearing and supporting plaintiff's refusal to answer questions thereat, said counsel was threatened with expulsion from the hearing room. A copy of the record of said hearing is marked Exhibit "F" attached to the original of this complaint, referred to, incorporated herein and made a part hereof by this reference. The written objections of plaintiff filed at said hearing are part of the record of said hearing. Upon said objections plaintiff refused to answer questions at said hearing.

9. At said hearing The Tenney Committee, by unanimous vote of its members, resolved that a criminal complaint be filed in the proper Court at Sacramento, California, because of plaintiff's refusal to answer questions at said hearing.

10. Such complaint charging plaintiff with the misdemeanor of violating section 9412 of the Government Code of the State of California, signed and sworn to by defendant Jack B. Tenney, was filed on January 31, 1949, in the Municipal Court of the City of Sacramento. Upon said complaint, plaintiff was arrested and imprisoned from the 1st day of February to the 15th day of February, 1949.

11. Plaintiff committed no public offense at said

hearing on the grounds that the resolution creating The Tenney Committee (Exhibit "A") if read into any criminal statute is in violation of the 14th Amendment of the Constitution of the United States for want of certainty; that said hearing on January 29, 1949, was not held for a legislative purpose; that said hearing was held for the purpose of suppressing the free exercise of constitutional rights of plaintiff, to wit: his rights of free speech and to petition the Legislature freely for redress of grievances; that the conduct of said hearing was in violation of due process of law in that the purpose or object of said hearing was not disclosed to plaintiff, and in that said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and as also expressly required under the resolution creating The Tenney Committee; that the questions asked of plaintiff at said hearing were not material and proper as required by section 9412 of the California Government code.

12. Plaintiff was tried with jury on said complaint on February 28, 1949, up to and including March 5, 1949, on which date the jury announced that the jurors could not agree on a verdict, the count being eleven (11) for acquittal and one (1) for conviction. Said cause was continued to March 9, 1949, on which date on motion of the prosecuting attorney the charge was dismissed and the plaintiff discharged.

13. The acts of defendants above set forth were done or participated in by said defendants with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, and prevent and deprive plaintiff.

14. The acts of defendants except defendant Elmer E. Robinson were done under color of the authority conferred upon defendant The Tenney Committee by the Constitution of the State of California and the California Senate resolution adopted thereunder creating said committee (Exhibit "A"). All defendants including defendant Elmer E. Robinson conspired for all of the aforesaid purposes and acted in furtherance of said conspiracy in the manner hereinabove set forth.

15. By the conduct of defendants hereinabove set forth plaintiff has suffered great physical hardship and mental pain and anguish and has incurred expenses in the amount of ten thousand dollars (\$10,000.00) for legal counsel, traveling, hotel accommodations, and other matters pertaining and necessary to his defense against said criminal complaint. Plaintiff also demands punitive damages.

Wherefore, plaintiff demands judgment against defendants, and each of them in the sum of Two hundred fifty Thousand dollars (\$250,000.00) and costs.

/s/ MARTIN J. JARVIS,

/s/ ELMER P. DELANY,

/s/ RICHARD O. GRAW,

Attorneys for Plaintiff.

State of California,

City and County of San Francisco—ss.

William Patrick Brandhove, being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing complaint; That he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

/s/ WILLIAM PATRICK BRANDHOVE.

Subscribed and sworn to before me this 17th day of March, 1949.

[Seal] /s/ R. M. SPILLANE,

Notary Public, in and for the City and County of San Francisco, State of California.

My Commission expires July 17, 1951.

EXHIBIT "A"

California Senate Resolution No. 75

(Adopted June 20, 1947)

Senate Resolution No. 75, as amended, Relative to the creation of a Senate Fact-Finding Committee on Un-American Activities, to investigate the activities of persons and groups known or suspected to be foreign dominated or controlled and to recommend legislation for their regulation.

Whereas, these are yet times of public danger. Subversive persons and groups are endangering our domestic unity so as to leave us unprepared to resist attack from without and within. Under color of the protection afforded by the Bill of Rights these persons and groups seek to destroy our freedom by force, violence, threats, undermining and sabotage, and to subject us to the domination of foreign powers and ideologies; and

Whereas, there is danger that the ordeal through which the Country has suffered to keep the pursuit of its ideals free may be in vain; and

Whereas, persons and groups, motivated by hatred of American ideals, our republican form of government and democratic processes, some bound together by allegiance to foreign powers, are even now seeking to achieve by subversion what we have so valiantly fought to sustain from force; and

Whereas, California, as one of the laboratories of this great Nation, may profitably study the problem within its boundaries, and enact pertinent legis-

lation therein, if facts are available therefor; and

Whereas, State legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee; now, therefore,

Be it Resolved by the Senate of the State of California,

That

1. The Senate Fact-Finding Committee on Un-American Activities is hereby created and authorized and directed to investigate, ascertain, study and analyze all facts directly or indirectly relating to the foregoing, to the activities of groups and organizations whose membership include persons who are members of organizations who have as their objectives, or part of their objectives, the overthrow of the governments of the State of California or of the United States by force and violence or other unlawful means, all organizations known or suspected to be dominated or controlled by a foreign power which activities affect the conduct of this State in national defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions of this State supported in whole or in part by public funds, or any political program, or which may affect the conversion of the State from a wartime economy to a peacetime economy or affect the economic and social problems incidental thereto, including but not limited to the operation, effect, administration, enforce-

ment, and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution, and to report thereon to the Senate.

2. In addition to the foregoing, the Senate Fact-Finding Committee on Un-American Activities is authorized and directed to ascertain, study and analyze all facts relating to the activities of persons and groups known or suspected to be dominated or controlled by a foreign power, and who owe allegiance thereto because of religious, racial, political, ideological, philosophical, or other ties, including but not limited to the influence upon all such persons and groups of education, economic circumstances, social positions, fraternal and casual associations, living standards, race, religion, politics, ancestry and the activities of paid provocation and any other factors which may account for their conduct or condition their action, as well as the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution, and to report thereon to the Senate.

3. The committee shall consist of six members of the Senate appointed by the Committee on Rules thereof. Vacancies occurring or existing in the membership of the committee shall be filled by the appointing power.

4. The committee is authorized to act during this session of the Legislature, including any recess, and after final adjournment until the final adjourn-

ment of the 1949 Regular Session, with authority to file its final report not later than the last legislative day of that session.

5. The committee and its members shall have and exercise all of the rights, duties and powers conferred upon investigating committees and their members by the provisions of the Joint Rules of the Senate and Assembly and the Standing Rules of the Senate as they are adopted and amended from time to time, which provisions are incorporated herein and made applicable to this committee and its members.

6. The committee has the following additional powers and duties:

(a) To select a chairman and a vice chairman from its membership, and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

(b) To contract with such other agencies, public or private, as it deems necessary for the rendition and affording of such services, facilities, studies and reports to the committee as will best assist it to carry out the purposes for which it is created.

(c) To cooperate with and secure the cooperation of county, city, city and county, and other local law enforcement agencies in investigating any matter within the scope of this resolution and to direct the sheriff of any county to serve subpoenas orders and other process issued by the committee.

(d) To report its findings and recommendations to the legislature and to the people from time to time and at any time, not later than herein provided.

(e) To do any and all other things necessary or convenient to enable it fully and adequately to exercise its powers, perform its duties, and accomplish the objects and purposes of this resolution.

(f) To create subcommittees from its membership, assigning to the subcommittee any study, inquiry, investigation or hearing which the committee itself has authority to undertake or hold, and the subcommittee for the purposes of this assignment shall have and exercise all of the powers conferred upon the committee limited by the express terms of the resolution or resolutions of the latter defining the powers and duties of the subcommittee, which powers may be withdrawn or terminated at any time by the committee.

(g) To adopt and from time to time amend such rules governing its procedure (including the fixing of its own quorum and the number of votes to take action on any matter) as may to it appear appropriate.

(h) To hold public hearings at any place in California at which hearings the people are to have an opportunity to present their views to the committee.

(i) To summon and subpoena witnesses, require the production of papers, books, accounts, reports,

documents, and records of every kind and description, to issue subpoenas and to take all necessary means to compel the attendance of witnesses and procure testimony.

(j) To report its findings and recommendations to the Legislature and to the people from time to time and at any time, not later than herein provided.

7. The committee, each of its members, and any representative of the committee thereunto authorized by the committee or by its chairman, is authorized and empowered to administer oaths.

8. Every department, commission, board, agency, officer and employee of the State Government, including the Legislative Counsel, the Attorney General and their subordinates, and of any political subdivision, county, city, or public district of or in this State shall furnish the committee any subcommittee, upon request, any and all such assistance, and information, records and documents as the committee or subcommittee deems proper for the accomplishment of the purposes for which the committee is created.

9. The committee, or a subcommittee or the chairman when authorized by a majority vote of the entire committee may meet outside the State with similar committees of Congress or of the several states.

10. The sum of thirty thousand dollars, or as much thereof as may be necessary, is hereby made .

available from the Contingent Fund of the Senate for the expenses of the committee and its members and for any charges, expenses or claims it may incur under this resolution, to be paid from said Contingent Fund, and disbursed, after certification by the chairman of the committee, upon warrants drawn by the State Controller upon the State Treasurer.

Resolution read as Amended.

The roll was called and the resolution adopted by the following vote:

Ayes: Senators Breed, Burns, Busch, Crittenden, Cunningham, Desmond, Donnelly, Gordon, Hulse, Judah, Keating, Kraft, Mayo, McBride, McCormack, O'Gara, Parkman, Quinn, Rich, Slater, Sutton, Ward, Watson, Weybret, and Williams—25.

Noes: Senators Carter, Collier and Jespersen—3.

Adopted June 20, 1947.

EXHIBIT "B"

The Following Statement of William Patrick Brandhove Constitutes a Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities. (The Tenney Committee):

I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an

instrument to smear Congressman Franck R. Havenner as a "Red" when he was a candidate for Mayor of San Francisco in 1947; and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end.

My charges are supported by the following sequence of events:

1. In 1947, months in advance of the November election, I met with R. E. Coombs, Chief Counsel of the California Senate Committee on Un-American Activities, in his room at the St. Francis Hotel, San Francisco, and told him that I was going to announce my candidacy for member of the San Francisco Board of Supervisors; that my candidacy was intended to furnish me with a platform on which to make speeches against Communism, Communist supported candidates and Communist from organizations. Mr. Coombs then suggested that in the event Franck Havenner became a candidate for Mayor of San Francisco, my campaign program would be an ideal setup for smearing him as a "Red". At that time, I like many other people, was taken in by the previous "Red" frame-ups that Committees of this kind had made against Franck Havenner, and it was in all sincerity that I agreed to brand him as a candidate of the Communists. During this interview I mentioned to Mr. Coombs that I had no campaign funds, and that I had no sources of financial support. Mr. Coombs assured me that I should have no worry on that score, that,

in his own words, "campaign funds would come to me."

2. During the course of the campaign I covered many political meetings at which Elmer Robinson was present. At each of these meetings I made my smear talk against Franck Havenner. At one meeting when I approached Mr. Robinson, he warned me that we should not be seen speaking with each other. This surprised me as I did not consider that there was any collusion between him and me. Mr. Robinson suggested that we meet privately. This we did on several occasions, one of them being at Lake Merced, where we both withdrew from a political picnic to walk unseen in a sequestered spot along the lake. Mr. Robinson told me that I was doing good work and urged me to keep up the attacks on Franck Havenner. I then told Mr. Robinson that I had no money for campaign purposes and that my car had broken down.

3. Mr. Robinson referred me to Warnock Walsh, a member of his campaign committee, who handed me five twenty dollar bills and assured me that more would be forthcoming. Mr. Walsh then introduced me to a member of the campaign organization who was in charge of the campaign car pool. This gentleman sent me to Monnet and Gordon, a novelty supply company, which later was the only firm to be given a concession by the city administration for selling souvenirs at the Portola Festival. They immediately made available for me a 1942

Buick, Mr. Monnet's personal car. They also paid for its storage, gas and oil.

4. Several days later, a member of Elmer Robinson's campaign committee, who had represented me legally, turned over to me \$500.

5. On one occasion I mentioned to Mr. Robinson that I would be willing to undertake the organization of waterfront headquarters for him. Mr. Robinson arranged for me to meet with Supervisor Dan Gallagher, who turned against Franck Havenner, when he (Gallagher) was not accepted by the liberal forces as a candidate for Mayor. Mr. Gallagher told me that waterfront headquarters were being set up by Harry Lundberg, President of the Sea Farers International Union.

6. During the campaign I mentioned to Mr. Robinson that I needed employment as my political activities has caused some estrangement between me and my union. Mr. Robinson assured me that I would be taken care of. After election I saw him and was given a card to Mr. Maher, of the Personnel Department of the San Francisco Health Department. Mr. Maher agreed to place four of my group in his department. He also offered me a job in the Public Utilities Department. I rejected this job because I had an opportunity to go to sea.

7. Starting about October 31, 1947, approximately five days before the Mayoralty Election of November 4, 1947, the Tenney Committee started its hearing in Oakland, and a fair and careful examination of the transcript of this hearing, read

in the light of what had preceded it, could lead to no other conclusion than that the Committee was again being used as a political weapon.

I believe that this chain of events speaks for itself, and that they throw a revealing light on the political manipulation of the Tenney Committee, now asking a senate appropriation of \$100,000.00.

Later, during the Congressional campaign of 1948, Mr. Havenner's stand on Marshall Aid, his repudiation of Independent Progressive Party Support, the expunging from the records of the smear made against him by the Dies Un-American Committee, caused me to re-examine his political views. I saw then that I had done him and other liberals an injustice, and my subsequent actions in the final campaign were made in atonement.

EXHIBIT "C"

Legislative Department
State of California

SUBPENA

Before the Senate Committee on Un-American Activities of the State of California

The People of the State of California Send Greetings to;

William Patrick Brandhove

You and each of you, are hereby commanded to appear before the Senate Committee on Unameri-

can Activities, Room 415, State Capitol, Sacramento, of The State of California, created by Senate Resolution No. 75, 1947 Regular legislative session, at Room 415, in the State Capitol, Sacramento, California, at 3 o'clock P.M., on Saturday, the 29th of January, 1949, as witness in an investigation by the said committee, and you are hereby commanded to bring with you the following now in your possession or under your control, to wit;

For failure so to attend you shall be liable to punishment as prescribed by law and the practice of legislative bodies.

By order of the Chairman of the said committee, this 28th day of January, 1949.

JACK B. TENNEY,
Chairman.

EXHIBIT "D"

Western Union
(Wire)

Sacramento, California
January 28, 1949.

Hon. Edmund G. Brown
District Attorney
County of San Francisco
550 Montgomery St.
San Francisco, California

William P. Brandhove Today Circulated a Signed Mimeographed Statement to Members of the Legislature Charging that the California Senate Com-

mittee on Un-American Activities Used Him "as an Instrument to Smear Congressman Frank R. Havenner as a Red When He Was a Candidate for Mayor of San Francisco in 1947." Brandhove's Sworn Affidavit in the City and County of San Francisco Under Date of December Nine, 1946 is Reproduced in the Committee's 1947 Report at Page 161, the Original of Which is in the Committee Files. Either Brandhove Told the Truth in This Affidavit or He Lied. On Behalf of the Senate Committee We Urge You to Either Immediately Charge Brandhove With Perjury or to Take the Matter Before the San Francisco Grand Jury. We Are Quite Certain That You Will Take the Necessary and Proper Steps in This Matter. Best Regards.

SENATOR JACK B. TENNEY,
Chairman.

SENATOR HUGH M. BURNS,
Vice-Chairman.

Senate Fact-Finding Committee On Un-American
Activities in California.

Charge Senate Account, J. A. Beek, Secretary
of the Senate.

EXHIBIT "E"

Western Union

(Wire)

Sacramento, California

January 28, 1949.

Hon. J. Frank Coakley

District Attorney

Alameda County

Oakland, California

William P. Brandhove Today Circulated a Signed Mimeographed Statement to Members of the Legislature Charging that the California Senate Committee on Un-American Activities Used Him "as an Instrument to Smear Congressman Frank R. Havenner as a Red When He Was a Candidate for Mayor of San Francisco in 1947." Brandhove Testified Before the Senate Committee in Oakland On or About November 4, 1947. Either He Told the Truth or He Lied. On Behalf of the Senate Committee We Urge You to Charge Brandhove With Perjury or Have the Entire Matter Presented to the Alameda Grand Jury. We Are Quite Certain That You Will Be As Desirous of Vigorous Action in This Case as Are the Members of the Committee. Best Regards.

SENATOR JACK B. TENNEY,
Chairman.

SENATOR HUGH M. BURNS,
Vice-Chairman.

Senate Fact-Finding Committee On Un-American
Activities in California.

Charge Senate Account, J. A. Beek, Secretary
of the Senate.

EXHIBIT "F"

Senate of the State of California Before the California Senate Fact Finding Committee on Un-American Activities.

Proceedings had and testimony taken before the California State Senate Fact Finding Committee on Un-American Activities in Open Meeting at the State of California Capitol Building, Room 415, Sacramento California, on Saturday, the twenty-ninth day of January, 1949.

Present:

Hon. Jack B. Tenney, Los Angeles, Chairman

Hon. Hugh M. Burns, Fresno, Vice-Chairman.

Hon. Nelson S. Dilworth, Riverside.

Hon. Fred H. Kraft, San Diego

Hon. Louis G. Sutton, Colusa

Hon. Clyde A. Watson, Orange.

Members of the State Senate Fact Finding Committee on Un-American Activities.

Appearances;

Francis J. O'Shea, Assistant Attorney General of the State of California, Counsel for the Committee.

Angus Morrison, Esq., Legislative Counsel of the California State Legislature.

Mr. Murray Straves, Executive Secretary of the Committee

Mrs. Linnie Tenney, Secretary of the Committee
Martin A. Jarvis, Esq.,
1002 De Young Building,
San Francisco, California

Appearing on behalf of William Patrick
Maher Brandhove

Index

	Page
Testimony of William Patrick Maher Brandhove	5
Statement of Hon. Elmer Robinson, Mayor of San Francisco.....	22
Testimony of Martin A. Jarvis.....	25
Testimony of Hon. Elmer Robinson.....	28

Proceedings

Chairman Tenney: For the purposes of the record, the Senate Committee on Un-American Activities is seated today and has present: Senator Hugh M. Burns of Fresno, Vice-Chairman; Senator Nelson S. Dilworth, of Riverside; Senator Louis G. Sutton of Colusa; and the Chairman, Jack B. Tenney of Los Angeles.

Also sitting with us is J. Francis O'Shea, Assistant Attorney General of the State of California, and Mr. Angus Morrison of the Legislative Council's Bureau.

I beg your pardon, Senator. Senator Fred H.

Kraft of San Diego should be included among the members of the Committee.

Also we have Mr. Murray Stravers, Executive Secretary of the Committee and Mrs. Linnie Tenney, Secretary of the Committee.

Now, Mr. Brandhove, will you come forward and be sworn?

WILLIAM PATRICK MAHER BRANDHOVE

called as a witness being first duly sworn, was examined and testified as follows:

Examination

By Chairman Tenney:

Q. State your full name, please.

A. William Patrick Maher Brandhove.

Q. Where do you reside, Mr. Brandhove?

A. 2418 Forty-fifth Avenue, San Francisco, California.

Q. What is your occupation?

A. Mariner, merchant mariner.

Q. Where did you reside in 1946, in December?

A. Mr. Tenney, I am represented here with counsel, Mr. Martin Jarvis of San Francisco, and I would like to act under his advice.

Q. You wish to confer with Mr. Jarvis?

Mr. Jarvis: May it please the Committee and Mr. Chairman, we object, at this time, to any further questions being propounded by this Committee to this witness on the ground that the purpose of such questions has not been disclosed to Mr. Brandhove

and the same are not for legislative purposes, not in the aid of legislative purposes or for the aid of the Legislature, and as foundation for such objection——

Chairman Tenney: One second, if I may, Mr. Jarvis. You are practicing law where?

Mr. Jarvis: San Francisco, Mr. Chairman, 1002 De Young Building.

Chairman Tenney: Are you associated with anyone?

Mr. Jarvis: No, I am not.

In that regard, Mr. Chairman, we have certain charges brought against this Committee and a sworn statement of such charges has been made. As a foundation for our objection, we will read the following statement of William Patrick Brandhove. The following statement of Mr. Brandhove constitutes a protest against a renewed appropriation for the California Senate Committee on Un-American Activities (the Tenney Committee)——

Chairman Tenney: Just a second, Mr. Jarvis. The Committee has received a copy of that.

Mr. Jarvis: This is a sworn copy, if the Committee please, and we ask to file it at this time.

Chairman Tenney: You have a sworn copy?

Mr. Jarvis: Yes, Mr. Chairman. May it appear of record that a sworn copy of said statement has been filed with the Committee at this time?

Chairman Tenney: Do you now, Mr. Brandhove, swear under oath, testifying under oath, that you made this copy and signed it and are acquainted with the matters in it?

Mr. Jarvis: In that regard, the statement is a sworn affidavit and speaks for itself, Mr. Chairman.

Our objections are on the following grounds: Objections of William Patrick Brandhove to answering questions before the Tenney Committee, January 29, 1949.

1. We object to answering questions by the Tenney Committee on ground that the purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation.

Chairman Tenney: Just a second, Mr. Jarvis, this has not been signed.

Mr. Jarvis: I am sorry, Mr. Chairman, here is a signed statement. That is a copy we gave you.

Objections of William P. Brandhove to answering questions before the Tenney Committee, January 29, 1949.

1. We object to answering questions by the Tenney Committee on the ground that the purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation.

2. Mr. Brandhove has reason to believe, and offers to prove, that the only reason he has been subpoenaed to appear before this committee is because of charges made by him in a sworn statement entitled, "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (the Tenney Committee)", and that questions on such subject are not for a

legislative purpose and are in excess of the jurisdiction of this Committee.

3. We charge that the Tenney Committee has been and is now at this hearing engaged in a political and not a legislative investigation in attempting to acquit itself of the charges made by Mr. Brandhove in his sworn statement on file with this Committee, and in this regard, we demand that a joint committee of the Assembly and Senate be constituted to investigate said charges that this Committee has not and is not now acting for a proper legislative purpose.

4. We charge that the Tenney Committee cannot, under elementary principles of law, act as judge and accused; that the Tenney Committee is not and cannot be a fair and impartial tribunal for the purpose of investigating its own non-legislative functions and that a joint committee of the Assembly and Senate, excluding the members of the Tenney Committee is the only proper body to investigate such charges.

5. That at no time has Mr. Brandhove refused to testify before the Tenney Committee and that the Committee itself, including its chief counsel, Mr. R. E. Coombs, has vouched for his veracity by their releases and reports in the past.

6. That the Tenney Committee's good faith is performing a legislative function is open to serious public question as evidenced by the charges of Mr. Brandhove, and of Assembly Concurrent Resolution No. 6 introduced by Messrs. Elliot, Hawkins, Con-

don and Lewis in the Legislature, to which reference is hereby made and a copy of same filed with this Committee and incorporated herein, in that prior to questioning Mr. Brandhove an investigation of un-American activities of the Tenney Committee must first be had to establish or refute such charges.

Chairman Tenney: Those objections are overruled, Mr. Jarvis.

Mr. Jarvis: I instruct the witness, Mr. Chairman, not to answer any further questions on those grounds.

Chairman Tenney: Those grounds are overruled and the objections are overruled and the witness will be directed to answer the questions.

Q. Mr. Brandhove, where were you residing in December, 1949?

A. I refuse to answer on advice of counsel.

Q. Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?

A. On advice of Counsel, I will not, no, sir.

Chairman Tenney: What is the feeling of the Committee?

Senator Dilworth: I feel the witness is in contempt of the Committee and the proper method of dealing with this matter is in the courts.

Chairman Tenney: I will call on Mr. O'Shea of the Attorney General's office.

Mr. O'Shea: It is my opinion, Mr. Chairman, that just as a matter of law, without taking into consideration any of the merits or demerits of the case,

that all of the specific questions which the Committee desires to ask the witness should be propounded to him, and if he desires to answer some of them he may do so, and if he refuses to answer others by reason of a refusal to answer any question, he should be given that opportunity.

Chairman Tenney: Mr. Morrison?

Mr. Morrison: I would suggest rather than taking up the time of the Committee and time of counsel and all parties concerned by going through numerous questions that he be asked, and if he refused to answer, he then be asked if he intends to refuse to answer all other questions. I think when his conduct clearly establishes that he has no intention and will not answer any questions propounded to him, no matter what it may be, on grounds stated, that it then becomes a matter of law and can be tested in the courts. I don't think it is necessary to go through each question.

Mr. O'Shea: I don't think all of them, but at least a dozen questions. He has only been asked, so far where he resides. I think fifteen or twenty pertinent questions should be asked of him.

Chairman Tenney: I believe it would be a good idea for Mr. Morrison to read for Mr. Brandhove and his counsel the law on the subject.

Mr. Morrison: I will read first Section 9410 of the Government Code, which states:

"A person sworn and examined before the Senate or Assembly or any committee cannot be held to answer criminally or be subject to any penalty or

forfeiture for any fact or act touching that which he is required to testify. Any statement made or paper produced by such witness is not competent in evidence in any criminal proceedings against the witness. The witness cannot refuse to testify to any fact or to produce any paper upon which he is examined for the reason that his testimony or the production of the paper may tend to disgrace him or render him infamous. Nothing in this section exempts any witness from prosecution or punishment for perjury committed by him on examination."

Section 9412 of the Same Government Code provides:

"Every person who being summoned to attend as a witness before the Senate, Assembly or any committee refuses or neglects without lawful excuse to attend pursuant to such summons, and every person who being present before the Senate, Assembly or a Committee, wilfully refused to be sworn, to answer any material and proper question, or to produce upon reasonable notice any material and proper books is guilty of a misdemeanor."

Mr. Jarvis: In that regard, may I read the Supreme ruling of the land on the subject?

Chairman Tenney: That is a matter for the Court, Mr. Jarvis. I don't think we will go into that here.

Mr. Jarvis: I would like to cite the case of Jones vs. Security Corporation——

Chairman Tenney: Mr. Sergeant-at-Arms, will you help the attorney, please?

We will proceed with the questions, and you may either answer them or not and the Committee will direct you to so answer the questions.

Q. Were you employed by the United States Army Transport Service as Chief Steward at any time?

A. I refuse to answer on advice of counsel.

Q. Were you living at 1831 Twenty-first Avenue in the City of San Francisco in December of 1946?

A. I refuse to answer upon the advice of counsel.

Q. Your objections here, Mr. Brandhove, are based on the grounds your counsel has propounded to the Committee? A. Yes, sir.

Q. And that is going to be the grounds, on which you object to answering every question?

A. I refuse to answer on advice of counsel.

Q. Will you refuse to answer every question that is propounded to you here today, Mr. Brandhove?

Mr. Jarvis: Mr. Chairman, in that regard, the objections have been written out and a copy has been presented to the Committee, and the objections are to answering any question based upon the grounds stated in those written objections on file with the Committee.

Q. (By Chairman Tenney): Now, Mr. Brandhove, will you state your objections so that we will have them in the record, please?

A. I object to answering questions by the Tenney Committee on the ground that the purpose of

such questions has not been disclosed to me and the same are not for a legislative purpose or in aid of legislation.

2. Mr. Brandhove has reason to believe, and offers to prove, that the only reason he has been subpoenaed to appear before this Committee——

Q. I want your objections in your own words, Mr. Brandhove, first person; I do not care what your attorney says.

A. I have reason to believe, and offer to prove, that the only reason I have been subpoenaed to appear before this Committee is because of charges made by me in a sworn statement entitled, "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (the Tenney Committee)" and that questions on such subjects are not for a legislative purpose and are in excess of the jurisdiction of this Committee.

3. I charge that the Tenney Committee has been and is now at this hearing engaged in a political and not a legislative investigation in attempting to acquit itself of the charges made by me in my sworn statement on file with this Committee, and in this regard, I demand that a joint Committee of the Assembly and Senate be constituted to investigate said charges that this Committee has not and is not now acting for a proper legislative purpose.

Q. What we are asking for, Mr. Brandhove, are your objections and the grounds upon which you

make those objections to answering questions propounded to you by this Committee.

A. Those are a part of my objections.

Q. Let's have the objections and not your demands.

A. I charge that the Tenney Committee cannot, under elementary principles of law, act as judge and accused; that the Tenney Committee is not and cannot be a fair and impartial tribunal for the purpose of investigating its own non-legislative functions, and that a joint committee of the Assembly and Senate, excluding the members of the Tenney Committee, is the only proper body to investigate such charges.

Q. Again, I want your objections and not your charges.

A. That is a part of my objection, Senator, and I really believe I have my right to read them. You asked me for them.

Q. Go ahead.

A. 5. That at no time have I refused to testify before the Tenney Committee and that the Committee itself, including its chief counsel, Mr. R. B. Coombs, has vouched for my veracity by their releases and reports in the past.

6. That the Tenney Committee's good faith in performing a legislative function is open to serious public question as evidenced by the charges of myself and of Assembly Concurrent Resolution No. 6 introduced by Messrs. Elliot, Hawkins, Condon and Lewis in the Legislature, to which reference is

hereby made and a copy of same filed with this Committee and incorporated herein, in that prior to questioning Mr. Brandhove an investigation of un-American activities of the Tenney Committee must first be had to establish or refute such charges.

Q. Now, do you refuse to answer any questions that will be propounded?

Mr. Jarvis: I would like first to offer Assembly Resolution No. 6, Mr. Chairman.

Chairman Tenney: I think we are familiar with it.

Mr. Jarvis: May it appear of record that the same has been filed as a part of the record?

Chairman Tenney: We are familiar with it and the fact it was offered by a functionary of the Communist Party by the name of Hall in Los Angeles and Assemblyman Elliot.

Q. Do you now and will you continue to refuse to answer each and every question which may be asked of you at this hearing on those grounds?

A. I refuse to answer any and all questions on advice of counsel.

Q. Do you know Mr. Frank McCormick?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Harry Bridges?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Louis Goldblat?

A. I refuse to answer on advice of counsel.

Q. Do you know David Jenkins?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with John Wiley?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Oleta O'Connor Yates?

A. I refuse to answer on advice of counsel.

Q. Do you know Paul Schnur?

A. I refuse to answer on advice of counsel.

Q. Do you know Sestoly Ward?

A. I refuse to answer on advice of counsel.

Q. Do you know Dick Linden?

A. I refuse to answer on advice of counsel.

Q. Do you know David Hedley?

A. I refuse to answer on advice of counsel.

Q. Do you know Revels Clayton?

A. I refuse to answer on advice of counsel.

Q. Do you know Mr. Mervyn Rathborne?

A. I refuse to answer on advice of counsel.

Q. Do you know Mr. Walter Stack?

A. I refuse to answer on advice of counsel.

Q. Do you know Blacky Quadros?

A. I refuse to answer on advice of counsel.

Q. Do you know Molly K. Spolmack?

A. I refuse to answer on advice of counsel.

Q. Do you know Elaine Sexton?

A. I refuse to answer on advice of counsel.

Q. Do you know Mary Lake?

A. I refuse to answer on advice of counsel.

Q. Do you know Mr. R. E. Combs?

A. I refuse to answer on advice of counsel.

Q. Do you know Hugh Bryson?

A. I refuse to answer on advice of counsel.

Q. Do you know Nathan Jacobsen?

A. I refuse to answer on advice of counsel.

Q. Do you know Irving Dvorin?

A. I refuse to answer on advice of counsel.

Q. Do you know Scotty Sneddon?

A. I refuse to answer on advice of counsel.

Q. Do you know Joseph Harris?

A. I refuse to answer on advice of counsel.

Q. Do you know James Kiernan?

A. I refuse to answer on advice of counsel.

Q. Do you know Frank Havenner?

A. I refuse to answer on advice of counsel.

Q. Calling your attention to February of 1945, did you discuss affiliation with the Communist Party with anyone?

A. I refuse to answer on advice of counsel.

Q. In February of 1945, did two men by the name of McCormick and Bryson agree to recommend you to membership in the Communist Party?

A. I refuse to answer on advice of counsel.

Q. Were you invited to a dinner by Frank McCormick at the home of Henry Fisher in San Francisco?

A. I refuse to answer on advice of counsel.

Q. Did you attend a dinner in San Francisco on or about February 1945 at which time was present Richard Gladstein, Walter Stack, Mrs. Stack and Mrs. Gladstein and Frank McCormick?

A. I refuse to answer on advice of counsel.

Q. Have you ever been, Mr. Brandhove, a member of the Communist Party?

A. I refuse to answer on advice of counsel.

Q. Are you now a member of the Communist Party, Hr. Brandhove?

A. I refuse to answer on advice of counsel.

Mr. Jarvis: Mr. Chairman, we have some more signed copies of the objections.

Chairman Tenney: We would be glad to have them.

Q. Referring to the affidavit that your counsel has presented to the Committee, is that your signature, William Patrick Brandhove?

A. I refuse to answer on advice of counsel.

Mr. Jarvis: In that regard, Mr. Chairman, the signature is before a Notary and the fact that the Notary is a Notary is a matter for judicial recognition.

Chairman Tenney: Is that your signature, William P. Brandhove?

Q. Did you take this affidavit before a Notary and have it notarized? A. Yes, I did.

Q. And that was on the twenty-ninth of January, 1949? A. This morning.

Q. Did you sign the affidavit in the presence of the Notary? A. Yes, I did, in his office.

Q. That is Mr. R. M. Stillane?

A. Yes, sir.

Q. Are you acquainted with Assemblyman George Collins?

A. I refuse to answer on advice of counsel.

Q. Were you a guest of Mr. Collins in the Assembly yesterday?

A. I refuse to answer on advice of counsel.

Q. Were you with Mr. Collins in the Assembly today?

A. I refuse to answer on advice of counsel.

Q. Are you a friend of William Snyderland, the secretary of the Communist Party in California?

A. I refuse to answer on advice of counsel.

Vice Chairman Burns: Mr. Chairman, and members of the Committee, I move that the Committee hold the witness in contempt of this committee on this date, and that counsel be instructed to prepare the necessary complaint and have it filed against him in the proper court of Sacramento.

Senator Dilworth: I second the motion.

Chairman Tenney: The motion is that counsel for the Committee be instructed to prepare the necessary complaints and follow the necessary procedure to bring this witness before the courts in Sacramento for contempt of this Committee. Who seconded the motion?

Senator Dilworth: I did.

Chairman Tenney: Seconded by Senator Dilworth. All in favor will signify by saying "Aye." Contrary minded?

(This motion was carried unanimously.)

Chairman Tenney: For the record, it should be stated that attention is called to the affidavit of William Patrick Brandhove of December 9, 1946, which appears in the Committee's 1947 report, and

of which the original copy is in the files of the Committee, subscribed and sworn to on the ninth day of December, 1946, before Ella Cook Kelly, a Notary Public in the City of San Francisco, in which affidavit, among other things, Mr. Brandhove admits being a former member of the Communist Party and specifically that he was induced to become a member of the Communist Party by Frank McCormick and Hugh Brysen in San Francisco; that after joining the Communist Party he carried out Communist activities and so forth.

He appeared before this present Committee in Oakland on November 4—the Committee sat there beginning November 3, 4, 5 and 6, instead of the thirty-first of August as alleged in the affidavit now filed with the Committee by Mr. Brandhove—and he testified on the fourth.

He testified rather fully in reference to a number of matters, and at that time Mr. Gladstein, the attorney for the Communist Party, did present to this Committee an affidavit made by Mr. Brandhove to the effect that the testimony given by Mr. Brandhove on other occasions was false and Brandhove testified he had been offered \$5,000 to make that particular affidavit.

The testimony is rather voluminous and it is here before the Committee.

Mr. Brandhove has a criminal record; He was charged with sodomy in Jersey City on October 27, 1930; on October 3, 1935, grand theft; and went to Preston School of Industry; May 5, 1940, in Oak-

land, sentenced to \$25.00 or five days for a violation of the California Motor Vehicle Code; April 7, 1942, wanted for grand theft and burglary in San Jose, California; March 17, 1946, San Francisco, malicious mischief at 1255 Kearney Street, San Francisco; November 26, 1946, San Francisco, violation of the Penal Code for defrauding an innkeeper; a felony warrant for his arrest charging grand theft, Section 503 of the Vehicle Code, was canceled in Los Angeles because the victim could not be located on March 3, 1947.

An affidavit allegedly signed by William Patrick Brandhove on October 24, 1948, and distributed in the City of San Francisco, is also before the Committee, containing certain allegations.

Mr. Brandhove made certain other affidavits in behalf of or for Congressman Frank Havenner, which were introduced in the Congressional Record of January 17 of this year.

Senator Dilworth: Introduced by Whom?

Chairman Tenney: Introduced by Frank Havenner, the Congressman himself.

The San Francisco News carried that story and a part of the allegation in that particular story referred to William Mailliard and Don Nicholsen of San Francisco, and Mr. Nicholsen made a statement to the press which was published in the San Francisco News of January 17, 1949, which reads as follows:

“Don Nicholsen, William Mailliard’s hired cam-

paign manager, said today he would 'welcome a congressional investigation as demanded by Mr. Havenner. Mr. Havenner has twice been re-elected through trick and device on the part of his supporters, and an opportunity to demonstrate that would be appreciated. The Brandhove affidavit is a tissue of lies and can be so proven.' "

Mr. Brandhove, I would like to have you answer one additional question. Just stand up, please. It won't be necessary for you to come up here.

Q. Are you acquainted with Congressman Franck Havenner's secretary?

A. I refuse to answer on the advice of counsel.

Q. On the grounds heretofore mentioned?

A. That is correct.

Q. One other question, Mr. Brandhove. Does the Army Transport Service in San Francisco have a record of your activities?

A. I refuse to answer on the advice of counsel.

Chairman Tenney: Very well; that is all.

Now, I wonder if the Mayor of the City of San Francisco, Mr. Elmer Robinson, is present?

Mayor Robinson: I am present and I would like to make a statement. I would like to make a statement first before being sworn and then if the Committee would like me sworn I am perfectly willing to be sworn.

Yesterday there was called to my attention a document that had been circulated among some of the legislators here in the State Capitol at Sacramento. I communicated with the chairman of this Commit-

tee, Senator Tenney. He talked with me on the telephone, and he acquainted me generally with the context of the pamphlet, and I expressed my desire to be here present today to challenge the statements set forth in that statement.

I ordinarily would refrain from dignifying such statements as are contained in the document, but when any man sees fit to come before a Committee of the State Senate and present such a document to which he has affixed his signature and state that he has sworn to it before a Notary Public, I desire the opportunity to testify at whatever time this Committee may determine with reference to all of the matters and things therein contained, wherein reference may be made to me either directly or indirectly.

The document contains inferences and innuendoes that are premised entirely on falsehoods, untruths, part truths and pure fiction.

I ask of this Committee the opportunity to be present and be sworn as a witness to testify completely with reference to all mention of me in that document.

Now, if the Committee desires it today I am prepared to be sworn today. If it is the wish of the Committee to defer hearing my testimony until such time as the witness Brandhove has been examined, I shall abide your wishes in that regard, of course.

Chairman Tenney: Will you be seated, Mayor Robinson? I would like to say this to the Committee: We now have this declaration by Mr. Brandhove under oath which is before the Com-

mittee and it no longer has the status it had yesterday when it was distributed to the members of the Legislature. I believe what Mayor Robinson says is true, I did speak to him yesterday on the telephone and acquainted him with the charges that are made in this document and told him I thought perhaps it would be well to have these things cleared up immediately, and in view of the fact, however, that Mr. Brandhove has refused to substantiate any of these things under oath before the Committee, it may be the status of the entire situation is changed.

What is the feeling of the Committee? Do you think we should take Mr. Robinson now or at a later date? I believe there will be nothing lost taking his testimony today.

Mayor Robinson: The facts will be the facts at any time you see fit to hear my testimony.

Chairman Tenney: I believe, Members of the Committee, and Mayor Robinson, as long as you have taken the trouble to be here today voluntarily and to give such testimony as the Committee requires, it would be best to proceed to examine you in reference to the matters to this document. If the Committee has no objection, we will do that.

Mr. Jarvis: Mr. Chairman, we object on the ground that the Committee has no jurisdiction to take this testimony.

Chairman Tenney: You have no right to object, Mr. Jarvis. You are representing Mr. Brandhove. You are not representing Mayor Robinson.

Mr. Jarvis: May I make my objection on the record?

Chairman Tenney: You may not.

Mr. Jarvis: On the ground it is for purposes of political activities rather than legislative purposes?

Chairman Tenney: You are not representing Mr. Robinson, to the best of my knowledge—Is he, Mr. Robinson?

Mayor Robinson: He certainly is not. I might point out to you that this gentleman has already participated in the hearing by offering evidence, and I feel, as a citizen, I am entitled to the right to refute that evidence at any time this Committee is willing to hear me. The hearing is on; this man has submitted evidence, he calls it evidence, and offers it in the record, and I demand the right to refute the statements contained in that document.

Chairman Tenney: We will go into that immediately, Mayor Robinson. However, I think before we do that I wonder if Mr. Jarvis would come forward and be sworn.

Senator Dilworth: Will you swear Mr. Jarvis?

MARVIN A. JARVIS

called as a witness, being first duly sworn, was examined and testified:

Examination

By Chairman Tenney:

Q. State your full name, for the record.

A. Marvin A. Jarvis.

Q. Where do you reside?

A. 500 Hyde Street, San Francisco.

Q. Where is your law office?

A. 1002 De Young Building, San Francisco.

Q. You are there alone? A. I am, sir.

Q. When were you admitted to the Bar in the State of California? A. 1947.

Q. Now, did Mr. Brandhove employ you for the purpose of representing him here in Sacramento?

A. He did.

Q. Is Mr. Brandhove paying you a fee for that matter? A. He will, yes.

Q. Have you had any retainer from him?

A. No.

Q. Are you acquainted with Mr. Franck Havenner? A. I am.

Q. How long have you known Mr. Havenner?

A. Since the Congressional elections.

Q. Of last year? A. Of last year.

Q. Where did you take your law studies?

A. Stanford University.

Q. Are you acquainted with Mr. Richard Gladstein? A. Professionally, yes.

Q. Mr. Aubrey Grossman? A. No.

Q. Professionally? A. No.

Q. Do you know who he is? A. No.

Q. Do you know Mr. Jenkins of the California Labor School? A. No.

Q. You have never met him? A. No, sir.

Q. Are you acquainted with Mr. Havenner's secretary? A. I am not.

Q. You have never met her? A. No, sir.

Q. When did you last talk to Mr. Havenner?

A. At a political meeting, three or four days before the election for Congress of last year.

Q. When did you last talk to him on the telephone? A. I never have.

Q. Are you acquainted with Mr. Elliot, an Assemblyman? A. I just met the gentleman.

Q. Are you acquainted with Mr. George Collins?

A. I am, professionally.

Q. How long have you known him?

A. Approximately two and a half years, casually. He represented a defendant in a case where I represented the plaintiff—Pardon me, it was just the other way around, he represented the plaintiff in a case where I represented the defendant.

Chairman Tenney: I think that is all, Mr. Jarvis.

Senator Dilworth: Will you swear Mayor Robinson?

ELMER ROBINSON

called as a witness, being first duly sworn, was examined and testified as follows:

Examination

By Chairman Tenney:

Q. Now, Mr. Mayor, would you be kind enough to give your name for the record?

A. Elmer Robinson; I live at 2100 Pacific Avenue, San Francisco, California.

Q. You are presently the Mayor of the City and County of San Francisco? A. I am.

Q. When were you elected to that office?

A. The November election of 1947.

Q. Do you recall, Mr. Mayor, the date of that election? A. November fourth, as I recall.

Q. I mention that because Mr. Brandhove's sworn affidavit alleges that the Committee on Un-American Activities started its hearings on October 31, 1947, approximately five days before the mayoralty election of November 4, 1947, in Oakland. The record shows, as a matter of public record, the Committee opened the hearings in Oakland on the third of November, and Mr. Brandhove testified on the fourth, which more or less makes Mr. Brandhove a liar by his own testimony on the public record.

Q. Have you ever met Mr. Brandhove?

A. A number of times.

Q. Can you tell us approximately the first time you met Mr. Brandhove?

A. Well, like most candidates for public office, I had to file within the time provided by law. I believe the last day for filing was sometime in September of 1947, the exact date I do not have in mind because I filed at 9:00 o'clock on the morning of the first day and started campaigning actively by visiting meetings from that time forward until election day. There were a great number of candidates who filed for public office in San Francisco at that election and among them was a man named—who gave his name as William Patrick Brandhove, a candidate for supervisor. There were four candidates for the office of mayor and there

were quite a number for the office of supervisor, I have forgotten just how *man*, because I was more concerned with the number running for the office of Mayor.

Now, I had better answer your question, Mr. Senator, like all candidates I covered every possible meeting, I spoke at breakfasts, luncheons, dinners and I went through department stores, spoke at factories, and every place where two or more people would stand still and listen I talked for Robinson for mayor and I covered all night meetings I could get a list of.

The candidates for mayor, there were three major candidates, one fellow who had somewhat less strength, but the three main candidates maintained headquarters, had staffs working for us, and, naturally, had a list of all meetings in San Francisco and, as a matter of fact, our offices even exchanged lists of meetings, and supervisors, having less staffs, would very often call our headquarters and ask for the various lists of meetings which were given to us each morning for the day and each night for the night, and I covered all I possibly could, sometimes as many as ten or eleven in one night and some nights only two, three or four, depending on how many gatherings there were made available to us, and, sometime, I would say, during the middle of September, now, this is an estimate, because I wasn't thinking of my own campaign—but my

recollection would be about the middle of September, maybe a week, more or less, one way or the other, one night there were three cars, maybe four fellows to the car, riding in my particular caravan, the other candidates had about the same, and I am riding along the street and we had occasion to stop and wait for some reason, I have forgotten what it was, and we heard a loud speaker blasting to beat the band a block away, and, figuring that it might be one of my opponents, I became concerned, and I caused an investigation to be made.

We went on our way but didn't catch up with the loud speaker that night.

On the next night we went to some meeting in the far Mission—the Mission District in San Francisco and the loud speaker came blandly up to the meeting and here was a car with a loud speaker attachment on it, and lo and behold, it had pasted on its two sides large signs, “Brandhove for Supervisor” and then underneath that held with some little bumper straps were the signs, “Robinson for Mayor.”

I became concerned and asked one of my boys to investigate and I don't recall for the moment who it was investigated, but I have a general idea, anyway, he reported back to me that this man was a candidate for supervisor and I said that I did not like the idea because I did not want to be involved in any supervisor's fight. Every night I had been meeting various candidates, the more

prominent ones, of course, more often because they were attending more meetings, and we would say "Hello" and might get well acquainted in six weeks time of campaigning, covering the same meetings you meet all the candidates and eventually I met Mr. Brandhove, whether I met him on the first night we identified the loud speaker or at a subsequent night, I cannot say.

Q. May I interrupt, were you running independently?

A. Yes, I was running independently as were the other candidates. There were no tickets in the campaign at all. As you know, the office is non-partisan. We had no package, and were all running on our own, even the supervisors—although I think three supervisors were running together, but generally there were no tickets.

Senator Kraft: May I ask a question?

Chairman Tenney: Is it relevant to what he is talking about now?

Senator Kraft: No, I will skip it.

Chairman Tenney: Just hold it for a moment.

A. (Continuing): As I met all the candidates, I met Mr. Brandhove. I observe, in connection with Mr. Brandhove's statement, that he met me; of course he met me, he couldn't help but meet me, because all the major candidates for the office of mayor at all meetings were asked to speak first because there were a greater number of candidates for supervisor. Then were called the incumbent

supervisors and on down the line would be the fellows who developed to be almost or also rans.

I never tarried very long at these meetings, after I made my talk I was off to the next one, and in spite of what Mr. Brandhove says in his statement I never heard him make a speech. One night I did walk into a place when he was just completing his speech, and he was walking out as I walked in, and that is the nearest I ever came to hearing Mr. Brandhove make any speech.

Chairman Tenney: All of this was between the dates of what?

A. I would say the middle of September and fourth of November.

Q. Now, did Mr. Brandhove at any time, or did you say to Mr. Brandhove at any time that he should not be seen talking with you or that you should be not seen speaking together?

A. No, that is absolutely untrue, false and untrue.

Q. Did you ever suggest to Mr. Brandhove that you meet with him privately?

A. No, I did not.

Q. Was there ever any conversation at all that could remotely be connected with such a suggestion on your part?

A. No, quite the contrary. There were two things that would account for that; one is I did not want to be associated with any candidate for supervisor because I was seeking the support of all the

people, and I did not want to be tied with any other candidate for supervisor, and, likewise, the other candidates were in the same position, they were remaining aloof from candidates for supervisor.

In addition to that, the only time Mr. Brandhove ever spoke to me, and he did approach me at different times and expressed himself in the presence of a number of people, that he was broke, that he didn't know whether he was going to be able to continue his campaign and he very patently hinted a few times that a couple of dollars would help him along and, later, I will point out a time when he very directly asked me for some money, and that is in paragraph 2 and just right along with the subject I am discussing.

Q. Let us take it along gradually, if you will.

A. Yes.

Q. Incidentally, did you ever have a conversation with me, the chairman of this committee, at any time during your campaign for the office of Mayor of the City of San Francisco?

A. Never a word. If I had seen you I would have talked to you, but I didn't see you.

Q. That is right. Did you talk to any of these senators, members of this Committee, in reference to your candidacy?

A. Not a one.

Q. Was there ever any understanding between you and myself or the members of this Committee that we were to assist your campaign by smearing any other candidate?

A. There was never any conversation at all. I never met up with any one of you at that time. You were pretty scarce, I don't know why, but you were not around San Francisco, and I was busy.

Q. We had other campaigns, Mr. Mayor.

Now, Mr. Brandhove makes this statement, first he says:

“Mr. Robinson suggested that we meet privately.” You have categorically denied that, and then he says, “This we did on several occasions, one of them being at Lake Merced, where we both withdrew from a political picnic to walk unseen in a sequestered spot along the lake. Mr. Robinson told me that I was doing good work and urged me to keep up the attacks on Franck Havenner. I then told Mr. Robinson that I had no money for campaign purposes and that my car had broken down.”

Will you tell the Committee what the situation is, if any, in that allegation?

A. Mr. Brandhove, on the occasion he did speak in my presence, was telling what he was going to do to the Communists down on the waterfront; how he was going to fight them alone, singlehanded, was going to carry the world, and he had a great number down on the waterfront who were going to follow him, and he was going to do great things.

I caused an investigation to be made among some friends of mine who belong to the various waterfront unions, and I learned that Mr. Brandhove

did not have the following he pretended to have and thereafter I pretty generally discounted that he would say as we would meet from time to time, and I instructed those who traveled with me in my campaign to stay away from him.

I received through the mail, at my home, an invitation to some sort of a railroad man's picnic, I don't recall which particular section of the railroad men it was, but it was to attend a picnic at Lake Merced, and being the candidate, and there being more than two people promising to be present, I went to the picnic and when I got there Mr. Brandhove was there, and one or two other gentlemen, and we waited around for the picnic to start, they had a loud speaker set up, and we waited and waited, and very few people put in an appearance, it was a pretty weak picnic, however, I made my speech over the radio, Mr. Brandhove, it seems, had already made his before I arrived, and, afterwards, Mr. Brandhove said, "I have something very important I want to say to you," and I said, "Well, let's wait until we get through." I wanted to shake hands all around with the people that were there, and we walked around and had a bottle of Coca Cola or a bottle of beer and tried to talk to everyone and get a few votes for Robinson for Mayor, and Brandhove had his cards advertising Brandhove for supervisor and I did go out thirty or forty feet with him, to the edge of the lake, and he told me he had written a book and that the book was

going to straighten out the world, and, as I recall, he gave me a copy of the book and it had a yellow paper on the cover and on the front, as I recall, it sold for a dollar a copy, but it was going to prove that there was a Communist behind every tree and behind every building and Brandhove was the man who was going to dispose of this whole program. I took the book home and that night or the next night I read a little bit of, but it was all Brandhove and his experience as a cook on a boat or something like that, and what labor had done to him, and what the Communists had done to him, and what he could do, I don't think I saved the copy of the book, I think it went in the waste basket, but whatever it was, that was the great thing, and then he said to me——

Q. This is at Lake Merced?

A. Yes. He said to me, "If I could just have some money——" He wanted to open headquarters down on the Embarcadero, and then he was going to divide all the seamen, of course he didn't know and I didn't tell him that I had a number of seamen who were advising me with reference to my campaign, and so I took it all with a grain of salt, that is what he said, but every approach for anything, just a few dollars, he was always crying that he was starving and broke, and I had a committee that handled that for me and I might have mentioned Mr. Warnock Walsh, I might have mentioned that he was the chairman of my finance com-

mittee. I may have told him that I had no money, that Mr. Walsh was the chairman of the finance committee, and that I had no money to give away anyway, I had enough to do to keep going myself.

However, that is the very secret conference that took place at Lake Merced. He wanted some money to print or distribute some more of these books, that was a part of the approach when we were out at the lake when he told me about the book that was going to settle the problems of the world. He needed some money to get out some more books, either to distribute them or to print them, I don't recall.

Q. You told him at that time that you didn't handle the money of the campaign? A. Yes.

Q. But you did refer to Mr. Walsh, who was your finance manager?

A. I told him I had no money, and that if he wanted any money that they were handling the campaign funds, I was not.

Q. Mr. Mayor, are you acquainted with the firm of Monnet and Gordon, in San Francisco?

A. Yes.

Q. Mr. Brandhove alleges in this statement of his, which is now under oath, that Mr. Walsh sent him to Monnet and Gordon, "a novelty supply company, which later was the only firm to be given a concession by the city administration for selling souvenirs at the Portola Festival. They immediately made available for me a 1942 Buick, Mr.

Monnet's personal car. They also paid for its storage, gas and oil."

A. I know nothing of that.

Q. It is generally true in most campaigns, however, that if you are promising candidate many good supporters do get together and donate cars for the use of the candidate?

A. I don't doubt that was done. My campaign was no different than any other, and I hope that my committee did as much as the other committees did, and I imagine that they did because I won the election and the polls, told me before the election that I was to be the successful candidate, and I had that information.

Q. The fourth paragraph alleges:

"Several days later, a member of Elmer Robinson's campaign committee, who had represented me legally, turned over to me \$500.00."

A. I have no knowledge of such a thing.

Q. Next is the one:

"On one occasion I mentioned to Mr. Robinson that I would be willing to undertake the organization of waterfront headquarters for him. Mr. Robinson arranged for me to meet with Supervisor Dan Gallagher, who turned against Franck Havenner, when he, Gallagher, was not accepted by the liberal forces as a candidate for mayor. Mr. Gallagher told me that waterfront headquarters were being set up by Harry Lundberg, president of the Sea Farers International Union."

Have you any comment to make on that?

A. Yes, that is not true. Mr. Brandhove didn't have to meet Mr. Dan Gallagher through any recommendation from me for this reason: Mr. Walsh and fifteen other San Francisco citizens, would travel with me every night to every political meeting, and some would go ahead of me and some would remain behind me and give me the results of the meeting as to my speech after I left on what I had said or what I should say when I would get to the next meeting, and I was thoroughly briefed on every meeting, and Mr. Gallagher was one of the group, and if Mr. Brandhove attended the meetings he says he did, then Mr. Brandhove met Mr. Gallagher on his own, if he did meet him. I don't know that he did, and I have never seen them speak together.

Q. His next statement is:

"During the campaign I mentioned to Mr. Robinson that I needed employment as my political activities had caused some estrangement between me and my union." As a matter of fact, he had been expelled.

"Mr. Robinson assured me that I would be taken care of. After election I saw him and was given a card to Mr. Maher, of the Personnel Department of the San Francisco Health Department. Mr. Maher agreed to place four of my group in his department. He also offered me a job in the Public

Utilities Department. I rejected this job because I had an opportunity to go to sea."

Do you have any comment on that?

A. Well, Mr. Brandhove tells an absolute untruth there because there isn't a man, woman or child living who can honestly say that I made them any promise for any position before I was elected to the office of mayor, and you may understand, Mr. Senator, and no doubt you do, not being an amateur yourself, I have been around political life for about thirty years, and one of the elementary things a man learns is that you do not make political promises of patronage in campaigns. If that had been thirty years ago when I was a young boy, there might have been some merit to it, but a man who knows anything about seeking public office knows better, he never does it, and I never did.

Now, Mr. Brandhove did. After I became mayor some months back, he came in with two men and said that they were starving, out of work, and wanted a job. Now, anyone who knows the charter of the City and County well knows I had no jobs to give. I have three jobs only, an executive secretary, a confidential secretary and a stenographer. Beyond that, excepting my commissions and boards, all jobs are Civil Service. I have no control over them, Mr. Senator, and not so much as you have, because you might be able to change the law here, but I have no control over them at all.

We have in the mayor's office the position of

public service director and he has an assistant. When anyone comes in from the street or sent in by acquaintances, whether it be a stranger or one with whom I am acquainted, they are by me or some one in my office referred to the public service director. He, in turn, takes them down to the Civil Service Commission. They, under the law, have the right to give what is known as temporary or ninety day employment if the employment is needed in a department and there is no Civil Service list available.

Now, Mr. Brandhove and these two men who were with him were referred by me to Mr. Sullivan, and Mr. Sullivan probably, if he did what he was supposed to do and would do if any person came in to him, he took them down to the Civil Service Commission and, undoubtedly, tried to get them employment because when starving people come in or people come in and report they are starving, we try to see if they can be helped, and that is the manner and the method of doing it in San Francisco.

Whether they got employment, I don't know.

Q. I believe that about covers it.

A. There is one thing you have not covered, and, then, so far as the volunteer statement is concerned, I believe I am through.

Two things I want to say, one is I don't know Franck Havenner to be a Communist, and the second one that I want to say is I have never said to a man,

woman or child that he is a Communist. I want that in the record.

Now, it is true that Mr. Brandhove did a lot of talking, I did the listening, and the things that are set forth in this statement are what Mr. Brandhove himself might have had in his mind or might even have said, but they are not what Robinson said.

Now, there is one other point that is made in paragraph 3, which, I believe, needs clarification. Mr. Brandhove in his statement says that he went to see the firm of Monnet and Gordon. I don't recall of ever having met Mr. Gordon, but, during the campaign, I went to make one of the Robinson campaign speeches before a group called the Show Folks of America, and a man by the name of Frank Winkleman was president of it, and he told me that they complained they had not been given an opportunity to exist in San Francisco, and I told them, a committee from their group, that if I became mayor of San Francisco I would see they got fair treatment. That was the extent of my statement.

I was elected, and Mr. Monnet became the president of Show Folks of America, and he came to see me with reference to the Portola Festival in San Francisco, and I referred him to the Portola Festival Inc.

Before I became Mayor, my predecessor, Mr. Roger Lapham, pursuant to recommendations by the Board of Supervisors, appointed two commissions, one for the Centennial Observance and the

other for the Portola Festival in San Francisco. My predecessor appointed those two committees.

The Portola Festival Committee, Inc., was one of them and the Centennial Observance was the other.

After I became mayor of San Francisco I called for the two files and examined the personnel of both committees and I determined, as mayor of San Francisco, that I would not add to or strike from the committee appointments of Mayor Lapham, and I did not appoint one man to either the Portola Festival Committee or the Centennial Committee, and neither did I remove anyone, so, when Mr. Monett came to see me about the Portola Festival and reminded me of my promise that the Show Folks of America would be given a fair deal, I referred him to the president of the Portola Festival Committee, Inc., and Mr. Monnet went from me to them and carried on his negotiations.

Mr. Brandhove says in his statement that Mr. Monnet and his group, the Show Folks of America, did get some concession at the Portola Festival, but I had no participation whatever, and whatever they got was direct with the corporation voluntarily and I say that it is very unfair and unjust and an unwarranted implication thrown into this statement with reference to that matter, and it is wholly without foundation or truth.

I think that covers it.

Chairman Tenney: Do the members of the Com-

mittee have anything to ask the Mayor of San Francisco?

Senator Dilworth: Mr. Chairman.

Chairman Tenney: Senator Dilworth.

Senator Dilworth: I would like to say I consider that the Mayor has been most frank and I want to congratulate him on his Americanism, and I think he has given us all the information in his possession.

Chairman Tenney: Are there any other questions?

Mr. Robinson, is there anything you wish to add?

A. Just this one thing, I shall hold myself available to this time or place it might desire to ask me any other questions in connection with this or any other matter.

Chairman Tenney: Thank you very much, and the record will show you appeared voluntarily, and the Committee appreciates your cooperation.

There are a couple of matters, before we adjourn, I think should be inserted in this record. One of the allegations made by Mr. Brandhove in his now sworn to affidavit is that the Committee, the Senate Committee on Un-American Activities, used him as an instrument to smear Congressman Franck R. Havenner as a Red, when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck

Havenner's opponent, conspired with the Tenney Committee to this end.

Calling the Committee's attention, and for the purpose of the record, to Mr. Brandhove's testimony before the Committee in Oakland in November, we have only been able to find one reference to Congressman Havenner in Mr. Brandhove's testimony, and that is this part which appears at page 127 of the Committee transcript of the testimony at that time, which reads:

"I have proven in a little pamphlet I just published called 'Communist Conspiracy on the United States Waterfronts' that since the adoption of the so-called 'democratic constitution' the party of San Francisco, did divert from the treasury of the Marine Cooks and Stewards Union, C.I.O., well over \$150,000 in the space of one year.

"Question by Mr. Combs: For what purpose?

"Answer: For purposes of course, of organizing the Communist party and encouraging a lot of political opportunists, such as Gladstein and his law firm. Incidentally, while I'm on that subject, I understand that the law firm of Gladstein, Sawyer, Resner, Andersen and Edises are very powerful today, not only in the affairs of the union, but also in city government. It appears they can even have judges take days off so they wouldn't have to sit in judgment upon them in court. It's amazing the strength they have. They hire people, pay them a thousand dollars, pick money out of thin air—it's really amazing."

Senator Dilworth: If this testimony has not been previously public I think the witness has pretty well discredited himself and the necessity to read it again is gone.

Chairman Tenney: The purpose of my reading into the record this part of his testimony is to show the only reference made in his testimony to Congressman Havenner. This allegation that he has in the affidavit that the Committee induced him and used him as a tool to smear Congressman Havenner, and this testimony was given on the day of the election, and I want it in the record to show that by his own testimony, either Mr. Brandhove was lying then or he is lying now.

(Continuing): "It's amazing the strength they have. They hire people, pay them a thousand dollars, pick money out of thin air—it's really amazing. Why, last Tuesday they donated a thousand dollars to Havenner."

That is the only reference to Congressman Havenner that we have been able to find in his testimony.

Just one other small part of the testimony that I think should be read into the record, because it shows the inconsistency, and that is the following, with appears at page 229 of the Committee's Oakland hearing, and the Chairman was asking Mr. Brandhove:

"Question by Chairman Tenney: Mr. Brandhove, may I make this suggestion: There were two points Mr. Gladstein made that require your answer. First, he charged that at the time that you

allege in your affidavit and testimony that you attended a Communist Party meeting together with himself and his wife, that first, you have never seen his wife, and secondly, at that time he was in Washington. And the second point, that you made an affidavit in which you accused Harry Lundeberg of furnishing at least part of the funds to the fight you were having against Communist Control of the Union. Now, about when was it you met Mr. and Mrs. Gladstein?

“Answer: The first time I met Mr. and Mrs. Gladstein was at the home of Henry Fisher during the month of February.

“Question by Mr. Combs: What year?

“Answer: 1945.

“Question: Was that on the occasion of your being recruited into the Communist Party?

“Answer: There were three days before my recruitment into the Communist Party.

“Question: In your affidavit you refer to being driven, I think by Mr. and Mrs. Gladstein, to a particular place where you had a Communist Party meeting. What was the approximate date?

“Answer: I was driven on two occasions, actually, by them. On one occasion it was the St. Francis Hotel, the Italian Room and that evening Mr. Gladstein and Mr. Schneiderman—

“Question: What Schneiderman?

“Answer: William Schneiderman—gave talks that night, and the subject under discussion was the Dumbarton Oaks Conference.

“Question: Can you describe, from your recollection, Mrs. Gladstein?

“Answer: Yes, she was I should say a slight woman, blonde——

“Question: Can you recall her first name?

“Answer: Oh, God, I don’t know her first name.

“Question: Was it in their automobile?

“Answer: Oh, yes.

“Question: Do you remember the type of automobile it was?

“Answer: It was a coupe, I recall, I believe a convertible.

“Question: Do you recall the make?

“Answer: No, I didn’t pay any attention.

“Question: But it was a coupe?

“Answer: It was, definitely.

“Question: Therefore, it is your testimony that Mr. Gladstein’s statement that he was in Washington at a particular time is not the time you referred to?

“Answer: I don’t know what he referred to.”
Now, we will go to page 232.

“Question: Will you tell us about the making of this affidavit, briefly?

“Answer: Oh, yes, I made it. I made two affidavits.

“Question: Briefly explain the circumstances.

“Answer: I was plagued by numerous telephone calls from Frank McCormick, who was at that time port agent of the Marine Cooks and Stewards Union. I wouldn’t accept the calls at the hotel.

Then finally I accepted them, and I told them to call me again that evening. The call was early in the morning, 9:00 o'clock, I would say. I told them to call me at 5:00 o'clock. He did call at 5:00. At that time Frank McCormick told me he wanted to see me. I said what about, and he said he wanted to see me about getting me to withdraw from the rank and file group. I told him I'd think it over and see him the following day. The following day I had lunch with him at Jimmy's Place down near the Embarcadero. It's used quite frequently by the Communist clique, and he said that Gladstein wished to see me about something he had in mind. Well, I had something in mind myself. I went up to see Gladstein anyway, and had a talk with him. At that time Richard Gladstein asked me if I would sign an affidavit prepared by him and guarantee him that I would not run for office for one year, and accept from him payment of \$5,000.00, mind you, if I would sign an affidavit prepared by him. I asked him what the content of that would be, and he said it would involve Harry Lundeberg, President of the Seafarers International Union of California. I said, 'How will it involve Lundeberg?' He said, 'I want you to say in that affidavit that moneys were received by your group from Lundeberg.' I told him to prepare the affidavit and I'd be back to sign it the following day. That night, together with two members of the Rank and File Publicity Committee, Kaplan and Martin Harris—

“Question: You realize you are accusing Gladstein of perjury?

“Answer: Oh, yes, I accused him in court of the same thing.

“Question: All right, continue.

“Answer: I went to the Powell Hotel where I dictated to a stenographer, stating that I would, on the following day, sign an affidavit that would be presented to me by Mr. Gladstein; that I wished to take this occasion, twenty-four hours in advance, of being on record; that I was merely signing that affidavit because it was presented to me as a threat of intimidation and coercion and an attempt to buy my will and an attempt to sway me away from my convictions against Communism. I went to Gladstein's office the following day as arranged, and signed the affidavit.”

Now, is there anything more to come before the Committee?

Mr. O'Shea, will you handle the matter referred to earlier by the Committee?

Mr. O'Shea: The matter will have to be presented to the City Prosecutor, if that is what the Committee intends to do. As far as I am concerned, it is a question of law now, and whoever is going to swear to it, if you decide you want to swear out a complaint, a member of the Committee will have to sign the complaint.

Chairman Tenney: The procedure in the past—our counsel was not able to be here today because

of an infection of his face, and, for the record, I talked to him yesterday, and he had the infection lanced and had to go to the doctor today and it was impossible for him to get here, but he did say categorically and emphatically and with complete emphasis that Mr. Brandhove was a liar and nothing of any kind ever occurred as stated by Mr. Brandhove, and that he will take the stand at any time under oath for the purpose of refuting the allegation in the document distributed by Mr. Brandhove.

Mr. O'Shea: Might I suggest this: That, as you know, the normal procedure would be for some one on the Committee, if they desire to issue a complaint for a misdemeanor committed within this City, to go to the prosecutor and swear out a complaint. Some member of the committee will have to swear to the complaint.

Chairman Tenney: I will be here until Monday at about 1:00 o'clock and I will sign the complaint myself.

Mr. O'Shea: It will have to be written up and taken to the City Prosecutor and sworn to before the Magistrate.

Chairman Tenney: That will be done.

If there is nothing further the Committee will stand adjourned until the call of the Chairman.

CERTIFICATE OF OFFICIAL
PHONOGRAPHIC REPORTER

State of California,
County of Sacramento—ss.

I, J. C. Dunn, hereby certify that I am an official phonographic reporter of the Superior Court of the State of California, in and for the County of Sacramento, and a competent phonographic writer.

That upon Saturday, January 29, 1949, I took down in phonographic writing all the testimony given and proceedings had before the California State Senate Fact Finding Committee on Un-American Activities in Room 415, State Capitol, Sacramento, California; that I thereafter caused my said phonographic writing to be transcribed into long-hand typewriting, and that the foregoing 52 pages constitute a full, true and correct transcription of all my said phonographic writing, so taken as aforesaid, and that the foregoing 52 pages constitute a full, true, correct, accurate and verbatim transcript of all said testimony and proceedings.

Dated: Sacramento, California, January 31, 1949.

J. C. DUNN,
Official Phonographic
Reporter.

[Endorsed]: Filed March 21, 1949.

[Title of District Court and Cause.]

MOTION TO DISCUSS COMPLAINT

Now come Jack B. Tenney; the Senate Fact Finding Committee on Un-American Activities, a California legislative committee; Hugh M. Burns; Nelson S. Dilworth; Fred H. Kraft; Louis G. Sutton, and Clyde A. Watson, each for himself and not one for the other, and files this his Motion to Dismiss Complaint of plaintiff in the above-entitled action:

I.

That said complaint does not state facts sufficient to confer upon the above-entitled court jurisdiction of the subject matter of said complaint for the following reasons and in the following particulars:

(1) That the complaint in the above-entitled action does not state facts sufficient to show that Senate Resolution No. 75, June 20, 1947, is invalid under the 14th Amendment of the Constitution of the United States if read into any criminal statute for want of certainty.

(2) That no diversity of citizenship between the parties is disclosed in said complaint.

(3) That said complaint fails to state facts sufficient to disclose any substantial claim for relief arising under the laws of the United States and/or the Constitution thereof.

II.

That the complaint in the above-entitled action

does not state facts sufficient to constitute a claim upon which relief can be granted.

III.

That the complaint in the above-entitled action does not state facts sufficient to constitute a claim upon which damages may be recovered from these defendants or either of them.

IV.

That said complaint is not a short and plain statement of the claim of plaintiff showing that the plaintiff is entitled to relief.

V.

That there is a misjoinder of causes of action in that there are joined together several causes of action in said complaint and not stated separately therein, to wit:

(1) A cause of action relating to a transaction or occurrence wherein it is claimed by plaintiff that he was deprived of certain rights in respect to circulating a petition to the Legislature of the State of California.

(2) A cause of action where it is claimed that plaintiff was deprived of certain rights in respect to being subpoenaed to appear before the Tenney Committee.

(3) A cause of action based upon a claim that plaintiff was deprived of certain rights in respect

to his appearance and the conduct of defendants, Jack B. Tenney, the Senate Fact Finding Committee on Un-American Activities, a California legislative committee, Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton, Clyde A. Watson, at a hearing before the Tenney Committee.

(4) A cause of action wherein it is claimed that plaintiff was deprived of certain rights in respect to the filing of a complaint in the Municipal Court of the City of Sacramento.

(5) A cause of action wherein it is claimed that plaintiff was deprived of certain rights by reason of a claimed invalidity of the resolution creating the Tenney Committee.

(6) A cause of action wherein it is claimed that plaintiff was deprived of certain rights pertaining to due process of law.

(7) A cause of action wherein it is claimed that plaintiff was deprived of equal protection of the laws.

(8) A cause of action wherein it is claimed that plaintiff was deprived of the right of free speech.

(9) A cause of action wherein it is claimed that plaintiff was deprived of his rights to petition the Legislature for redress of grievances.

(10) Plaintiff attempts to allege a cause of action against the defendants collectively and indi-

vidually with a cause of action based on the claim that a conspiracy existed between them.

VI.

That said complaint is uncertain in that it does not appear therein nor can it be ascertained therefrom how or in what manner or by what means:

(A) Why the subpoena referred to in Paragraph 3 of the complaint should, or what authority in law required it to, state the purpose or object of said hearing or to refer to or state the purpose or object of plaintiff's required testimony thereat, as alleged in said paragraph.

(B) Any of the matters referred to in Paragraph 4 of said complaint could or have in any manner affected any legal or constitutional right, privilege or immunity of plaintiff.

(C) The appearance of Elmer E. Robinson as a voluntary witness and denying the truth of the charges set forth in plaintiff's so-called petition could in any manner thwart the charges contained in said petition and defeat the purpose stated in said petition.

(D) The sending of either or any of the telegrams referred to in Paragraph 5 of said complaint could in any manner deprive or subject plaintiff to the deprivation of any rights, privileges or immunities secured by the Constitution and laws as set forth in Section 43, Title 8, USCA, or of the

equal protection of the laws or of equal privileges or immunities under the laws as provided for in Section 47, Subdivision 3, Title 8, USCA.

(E) Any act alleged in Paragraph 6 of said complaint could deprive plaintiff of any rights as set forth in the preceding subdivision.

(F) Any act alleged in Paragraph 7 of said complaint could or did in any manner deprive the plaintiff of any rights or privileges as particularly alleged in Subdivision D hereof.

(G) Except from the legal conclusion of the pleader, the Tenney Committee acted as judges and accused in the same cause at said hearing and/or held and/or conducted the same in an unfair, partial or unlawful manner.

(H) Any act alleged in Paragraph 8 of said complaint relating to Elmer E. Robinson deprived or tended to deprive plaintiff of any of the rights, privileges or immunities as particularly alleged in Subdivision D hereof.

(I) The asking of questions which had previously been answered by plaintiff could in any manner deprive him of any of the rights, privileges or immunities as particularly alleged in Subdivision D hereof.

(J) Whether testimony previously given by the Tenney Committee, the reading of either a true or a false criminal record of plaintiff or a newspaper article wherein an affidavit of plaintiff was

called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of the Tenney Committee to Jack B. Tenney "that Mr. Brandhove was a liar," in any manner deprived, directly or indirectly, this plaintiff of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(K) Any act of the Committee in respect to counsel for plaintiff as alleged in Paragraph 8 in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(L) Any act alleged in Paragraph 9 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(M) Any act alleged in Paragraph 10 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(N) Any provision of the resolution creating the Tenney Committee is in violation of the 14th Amendment of the Constitution of the United States for want of certainty if read into any criminal statute, as alleged in Paragraph 11 of said complaint.

(O) The resolution creating the Tenney Com-

mittee is in violation of the 14th Amendment of the Constitution of the United States in any particular.

(P) Except from the legal conclusion of the pleader, that said hearing on January 29, 1949, was held for any of the purposes set forth in Paragraph 11 of said complaint.

(Q) Except from the legal conclusion of the pleader.

(1) That the conduct of said hearing was in violation of due process of law in that the purpose or object of said hearing was not disclosed to plaintiff;

(2) That said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and/or as also expressly required under the resolution creating the Tenney Committee;

(3) That the questions asked of plaintiff at said hearing were not material and proper as required by Section 9412 of the California Government Code.

(R) Any act alleged in Paragraph 12 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(S) Except from the legal conclusion of the pleader, the acts of defendants alleged in said complaint or done or participated in by said defendants were done with intent:

(1) To intimidate and silence plaintiff and/or to deter or prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances.

(2) To deprive him of the equal protection of the laws, due process of law and from the enjoyment of equal privileges and immunities as a citizen of the United States under the law.

(T) Except from the legal conclusion of the pleader, any act alleged in said complaint and particularly in Paragraph 13 thereof would intimidate, silence, prevent, deter and deprive plaintiff from any of the rights set out in Paragraph 13.

(U) The defendants or any of them conspired for any of the purposes set forth in said complaint and/or acted in furtherance of said or any conspiracy in the manner therein set forth.

(V) The defendants or any of them conspired at all.

(W) Any act of all or any of the defendants attempted to be alleged in said complaint entitles plaintiff to punitive damages.

(X) The defendant incurred expenses in the sum of Ten Thousand Dollars (\$10,000.00) for all or any of the items set forth in Paragraph 15 of said complaint.

VII.

That said complaint is ambiguous in each and

every particular in which it is hereinabove alleged to be uncertain.

VIII.

That said complaint is unintelligible in each and every particular in which it is hereinabove alleged to be uncertain.

Wherefore, defendants pray that plaintiff take nothing by said action and that said complaint be dismissed, that a judgment of dismissal be entered in favor of these defendants and for their costs of suit and for such other and further relief as the Court may deem advised.

Dated: May 19, 1949.

HAROLD C. FAULKNER,

MELVIN, FAULKNER,

SHEEHAN & WISEMAN.

WILBUR F. MATHEWSON,

FRED M. HOWSER,

J. FRANCIS O'SHEA,

FRED B. WOOD,

Attorneys for Defendants Other Than Elmer E.
Robinson.

NOTICE OF HEARING ON MOTION TO
DISMISS

To: Plaintiff above named and to Messrs. Martin J. Jarvis, Richard O. Graw and Elmer P. Delany, his attorneys.

You and each of you will please take notice that the undersigned will bring the above motion on for hearing before this Court at Room 276, United States Courts and Post Office Building, City of San Francisco, State of California, on Monday, the 6th day of June, 1949, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

HAROLD C. FAULKNER,

MELVIN, FAULKNER,

SHEEHAN & WISEMAN.

WILBUR F. MATHEWSON,

F. N. HOWSER,

J. FRANCIS O'SHEA,

FRED B. WOOD,

Attorneys for all defendants in the above entitled action save and except defendant Elmer E. Robinson.

Receipt of copy acknowledged.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES ON MOTION TO DISMISS

I.

The suit is not one arising under the Constitution or laws of the United States.

A. Where diversity of citizenship is not shown, the Court has no jurisdiction unless a substantial question arising under a Federal law or the Constitution is disclosed in the pleading. *Ex Parte Poresky*, 290 U. S. 30.

B. Attack on the validity of State of California Resolution No. 75 creating the Senate Fact-Finding Committee on Un-American Activities does not create a substantial question of invalidity under the laws of the United States or the Constitution thereof. *Dennis v. United States*, 171 R. (2d) 986.

C. A suit to enforce a right which takes its origin in the laws of the United States is not for that reason alone one arising under the laws unless it really in substance involves a dispute respecting the validity, construction or effect of such a law upon the determination of which the case depends. *Viles v. Symes*, 129 F. (2d) 828.

D. XIVth Amendment to the Constitution of the United States.

II.

That said complaint fails to disclose any facts or circumstances indicating an existing or continuing conspiracy or act interfering with or impeding in any manner any right of plaintiff under the Constitution of the United States. (See Complaint.)

III.

That several causes of action have been improperly joined. (See Rules 8, 9 and 10, Rules of Civil Procedure.)

Each claim founded upon a separate transaction or occurrence must be separately stated. *Bottone v. Lindsley*, 170 F. (2d) 75.

IV.

The complaint is uncertain, ambiguous and unintelligible.

V.

It is to be observed that both houses of the Legislature of the State of California, pursuant to concurrent resolution and pursuant to Section 2, Article 4 of the Constitution of the State of California,

“Resolved that the 1949 regular session of the Legislature of the State of California shall adjourn for recess at 3:00 o'clock p.m. on the 24th day of January, 1949, and shall reassemble at 12:00 o'clock m. on March 7, 1949.”

VI.

That every right claimed by plaintiff to be violated was, according to the allegations of plaintiff's complaint, completely observed in so far as any act of conduct of these defendants is concerned.

VII.

That Section 43 and 47 (3) of Title 28 U.S.C.A. relied upon under the claimed facts and circumstances set forth in plaintiff's complaint as establishing a claim for relief, are void for uncertainty under the laws of the United States. *Screws v. United States*, 325 U. S. 91, 65 S. Ct., 1031, 1033.

Dated: May 19, 1949.

Respectfully,

HAROLD C. FAULKNER,

MELVIN, FAULKNER,

SHEEHAN & WISEMAN.

WILBUR F. MATHEWSON,

F. N. HOWSER,

J. FRANCIS O'SHEA,

FRED B. WOOD,

Attorneys for All Defendants Except Elmer E.
Robinson.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT

Now comes Elmer E. Robinson and files this motion to dismiss the complaint of plaintiff in the above-entitled action.

I.

That said complaint does not state facts sufficient to confer upon the above-entitled court jurisdiction of the subject matter of said complaint for the following reasons and in the following particulars:

(1) That the complaint in the above-entitled action does not state facts sufficient to show that Senate Resolution No. 75, June 20, 1947, is invalid under the 14th Amendment of the Constitution of the United States if read into any criminal statute for want of certainty.

(2) That no diversity of citizenship between the parties is disclosed in said complaint.

(3) That said complaint fails to state facts sufficient to disclose any substantial claim for relief arising under the laws of the United States and/or the Constitution thereof.

II.

That the complaint in the above-entitled action does not state facts sufficient to constitute a claim upon which relief can be granted.

III.

That the complaint in the above-entitled action does not state facts sufficient to constitute a claim upon which damages may be recovered from this defendant.

IV.

That said complaint is not a short and plain statement of the claim of plaintiff showing that the plaintiff is entitled to relief.

V.

That there is a misjoinder of causes of action in that there are joined together several causes of action in said complaint and not stated separately therein, to wit:

(1) A cause of action relating to a transaction or occurrence wherein it is claimed by plaintiff that he was deprived of certain rights in respect to circulating a petition to the Legislature of the State of California.

(2) A cause of action wherein it is claimed that plaintiff was deprived of certain rights in respect to being subpoenaed to appear before the Tenney Committee.

(3) A cause of action based upon a claim that plaintiff was deprived of certain rights in respect to his appearance and the conduct of defendants, Jack B. Tenney, The Senate Fact Finding Committee on Un-American Activities, a California legislative committee, Hugh M. Burns, Nelson S. Dil-

worth, Fred H. Kraft, Louis G. Sutton, Clyde A. Watson, at a hearing before the Tenney Committee.

(4) A cause of action wherein it is claimed that plaintiff was deprived of certain rights in respect to the filing of a complaint in the Municipal Court of the City of Sacramento.

(5) A cause of action wherein it is claimed that plaintiff was deprived of certain rights by reason of a claimed invalidity of the resolution creating the Tenney Committee.

(6) A cause of action wherein it is claimed that plaintiff was deprived of certain rights pertaining to due process of law.

(7) A cause of action wherein it is claimed that plaintiff was deprived of equal protection of the laws.

(8) A cause of action wherein it is claimed that plaintiff was deprived of the right of free speech.

(9) A cause of action wherein it is claimed that plaintiff was deprived of his rights to petition the Legislature for redress of grievances.

(10) Plaintiff attempts to allege a cause of action against the defendants collectively and individually with a cause of action based on the claim that a conspiracy existed between them.

VI.

That said complaint is uncertain in that it does

not appear therein nor can it be ascertained therefrom how or in what manner or by what means:

(a) Why the subpoena referred to in Paragraph 3 of the complaint should, or what authority in law required it to, state the purpose or object of said hearing or to refer to or state the purpose or object of plaintiff's required testimony thereat, as alleged in said paragraph.

(b) Any of the matters referred to in Paragraph 4 of said complaint could or have in any manner affected any legal or constitutional right, privilege or immunity of plaintiff.

(c) The appearance of Elmer E. Robinson as a voluntary witness and denying the truth of the charges set forth in plaintiff's so-called petition could in any manner thwart the charges contained in said petition and defeat the purpose stated in said petition.

(d) The sending of either or any of the telegrams referred to in Paragraph 5 of said complaint could in any manner deprive or subject plaintiff to the deprivation of any rights, privileges or immunities secured by the Constitution and laws as set forth in Section 43, Title 8, USCA, or of the equal protection of the laws or of equal privileges or immunities under the laws as provided for in Section 47, Subdivision 3, Title 8, USCA.

(e) Any act alleged in Paragraph 6 of said complaint could deprive plaintiff of any rights as set forth in the preceding subdivision.

(f) Any act alleged in Paragraph 7 of said complaint could or did in any manner deprive the plaintiff of any rights or privileges as particularly alleged in Subdivision D hereof.

(g) Except from the legal conclusion of the pleader, the Tenney Committee acted as judges and accused in the same cause at said hearing and/or held and/or conducted the same in an unfair, partial or unlawful manner.

(h) Any act alleged in Paragraph 8 of said complaint relating to Elmer E. Robinson deprived or tended to deprive plaintiff of any of the rights, privileges or immunities as particularly alleged in Subdivision D hereof.

(i) The asking of questions which had previously been answered by plaintiff could in any manner deprive him of any of the rights, privileges or immunities as particularly alleged in Subdivision D hereof.

(j) Whether testimony previously given by the Tenney Committee, the reading of either a true or a false criminal record of plaintiff or a newspaper article wherein an affidavit of plaintiff was called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of the Tenney Committee to Jack B. Tenney "that Mr. Brandhove was a liar," in any manner deprived, directly or indirectly, this plaintiff of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(k) Any act of the Committee in respect to counsel for plaintiff as alleged in Paragraph 8 in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(l) Any act alleged in Paragraph 9 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(m) Any act alleged in Paragraph 10 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(n) Any provision of the resolution creating the Tenney Committee is in violation of the 14th Amendment of the Constitution of the United States for want of certainty if read into any criminal statute, as alleged in Paragraph 11 of said complaint.

(o) The resolution creating the Tenney Committee is in violation of the 14th Amendment of the Constitution of the United States in any particular.

(p) Except from the legal conclusion of the pleader, that said hearing on January 29, 1949, was held for any of the purposes set forth in Paragraph 11 of said complaint.

(q) Except from the legal conclusion of the pleader,

1. That the conduct of said hearing was in violation of due process of law in that the purpose or object of said hearing was not disclosed to plaintiff;

2. That said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and/or as also expressly required under the resolution creating the Tenney Committee;

3. That the questions asked of plaintiff at said hearing were not material and proper as required by Section 9412 of the California Government Code.

(r) Any act alleged in Paragraph 12 of said complaint in any manner deprived plaintiff, directly or indirectly, of any of the rights, privileges or immunities particularly alleged in Subdivision D hereof.

(s) Except from the legal conclusion of the pleader, the acts of defendants alleged in said complaint or done or participated in by said defendants were done with intent:

1. To intimidate and silence plaintiff and/or to deter or prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances.

2. To deprive him of the equal protection of the laws, due process of law and from the enjoyment of

equal privileges and immunities as a citizen of the United States under the law.

(t) Except from the legal conclusion of the pleader, any act alleged in said complaint and particularly in Paragraph 13 thereof would intimidate, silence, prevent, deter and deprive plaintiff from any of the rights set out in Paragraph 13.

(u) The defendants or any of them conspired for any of the purposes set forth in said complaint and/or acted in furtherance of said or any conspiracy in the manner therein set forth.

(v) The defendants or any of them conspired at all.

(w) Any act of all or any of the defendants attempted to be alleged in said complaint entitled plaintiff to punitive damages.

(x) The defendant incurred expenses in the sum of Ten Thousand Dollars (\$10,000.00) for all or any of the items set forth in Paragraph 15 of said complaint.

VII.

That said complaint is ambiguous in each and every particular in which it is hereinabove alleged to be uncertain.

VIII.

That said complaint is unintelligible in each and every particular in which it is hereinabove alleged to be uncertain.

Wherefore, defendant, Elmer E. Robinson, prays that plaintiff take nothing by said action and that said complaint be dismissed, that a judgment of dismissal be entered in favor of the defendants and for their costs of suit and for such other and further relief as the Court may deem advised.

Dated: May 19, 1949.

McGUIRE & LAHANIER.

By /s/ W. A. LAHANIER,

Attorneys for Defendant,

Elmer E. Robinson.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES ON MOTION TO DISMISS

In support of the motion of the defendant, Elmer E. Robinson, it is his contention that he committed no acts which violated any Civil Rights of the plaintiff, and that, aside from legal conclusions, the complaint fails to allege the commission of any acts by the defendant, Elmer E. Robinson, whereby the plaintiff was deprived of any civil rights.

Where lack of diversity of citizenship is shown, Court has no jurisdiction unless a substantial Federal or Constitutional law is disclosed in the pleading. *Ex Parte Poresky* 29 F. S. 30.

Attack on the validity of the State of California

Resolution No. 75 creating the Senate Fact-Finding Committee on Un-American Activities does not create a substantial question of invalidity under the laws of the United States or the Constitution thereof. *Dennis vs. United States*, 171 F. (2d) 986. *McGrain vs. Dougherty*, 273 U. S. 135.

For a suit to enforce a right which takes its original in the laws of the United States is not for that reason alone one arising under the laws unless it really in substance involves a dispute respecting the validity, construction or effect of such a law upon the determination of which the law depends. *Viles vs. Symes*, 129 F. (2d) 828.

That each claim formed upon a separate transaction or occurrence is not separately stated in said complaint. (See for further particulars the next succeeding paragraph.) *Bottone vs. Lindsley*, 170 F. (2d) 75.

That if Sections 43 and 47 are relied upon under the claimed facts and circumstances set forth in plaintiff's complaint said sections are void for uncertainty under the laws of the United States. *Screws vs. United States*, 325 U. S. 91. (65 Supreme Court 1031 and 1033.)

That said complaint fails to disclose any facts or circumstances indicating an existing or continuing conspiracy or act interfering with or impeding in any manner any right of plaintiff under the Constitution of the United States.

For plaintiff to invoke jurisdiction of Federal District Court on grounds that he seeks protection of a

Federal right, the complaint, on its face, must appear to raise a "substantial Federal question," and mere claim in words or contention, which is obviously without merit, is insufficient. *Williams vs. Miller*, 48 F. (Supp.) 277, aff'd. 317 U. S. 599.

That every right claimed by laintiff to be violated was, according to the allegations of plaintiff's complaint, completely observed insofar as any act of conduct of defendant Elmer E. Robinson was concerned.

Plaintiff's complaint expressly alleges that defendant, Elmer E. Robinson, was acting as an individual and not under color of authority. Hence, no cause of action is stated as to him, even if we assume that the legal conclusions of the complaint would be sufficient to state a cause of action.

Powe vs. United States, 109 Fed. (2d) 147.

Respectfully submitted,

McGUIRE & LAHANIER.

By /s/ W. A. LAHANIER,

Attorneys for Defendant,
Elmer E. Robinson.

[Endorsed]: Filed May 19, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITIES SUPPLEMENTING ORAL ARGUMENT ON MOTION TO DISMISS

Plaintiff attempts to state a cause of action for damages against certain of the members of the Senate of the State of California by reason of their official conduct while serving on the Senate Fact-Finding Committee on Un-American Activities in California.

Defendants have moved to dismiss.

Defendants, members of the State Senate, respectfully urge in support of their motion:

I.

When ordinary and existing rules for the construction of pleadings are applied—plaintiff fails completely to allege any fact or circumstance showing deprivation of any right, privilege or immunity under the Constitution of the United States, including the 14th Amendment.

1. Due Process of Law. No fact is alleged indicating in the slightest degree the deprivation of due process of law. In reading the complaint and trying to follow the argument of counsel, it appears that some claim is made that a right of the defendant was invaded by reason of having been served with a subpoena, which is made a part of the complaint.

In connection with the issuance of subpoenas by committees of the Senate or Assembly, the form

thereof is prescribed by Section 9402 of the Government Code, which reads as follows:

“A subpoena is sufficient if it:

(a) States whether the proceeding is before the Senate, Assembly, or a committee.

(b) Is addressed to the witness.

(c) Requires the attendance of the witness at a time and place certain.

(d) Is signed by the President of the Senate, Speaker of the Assembly, or chairman of the committee before whom attendance of the witness is desired.”

Every requirement of this section is complied with.

It must be borne in mind that the Legislature is and has been held to be “* * * the grand inquest of the Commonwealth.” *Ex parte McCarthy*, 29 Cal. 395, 402. A witness subpoenaed before a legislative committee is analagous to a witness subpoenaed before a grand jury. Applying the analogy, we find plaintiff's claim has consistently been decided adversely to his contention. See *In re Black*, 47 F. 2d 543; also, *Blair v. United States*, 250 U. S. 273. Plaintiff cited no authorities in support of his position.

2. Freedom of Speech. The complaint is completely silent on any facts or circumstances which in the slightest degree indicated that he was deprived of freedom of speech. As a matter of fact, when he had the opportunity to speak, he spoke

the things he wanted to say, then remained silent and refused to answer any questions.

3. The privilege of petitioning the Legislature for the redress of grievances. Although a claim is made in this respect by plaintiff and appears to be the main point relied upon, plaintiff was unable at the oral argument to indicate any fact or circumstance indicating in the slightest degrees the deprivation of this right by the act of any defendant in the case at bar or anyone else.

The requirement to plead specific facts as distinguished from conclusions of law is essential in cases of this type. See opinion of Judge Wilbur in *Williams v. Miller*, 48 F. Supp. 277. In denying certiorari in this case, the Supreme Court of the United States held in accordance with the opinion of Judge Wilbur. See 317 U. S. 599.

II.

One of the bases of plaintiff's complaint is the claim that the resolution creating the Tenney Committee, if read into any criminal statute, is in violation of the 14th Amendment to the Constitution of the United States for want of certainty. See Paragraph 11 of plaintiff's complaint. This same attack has frequently been made upon the act of Congress creating the United States House of Representatives Committee on Un-American Activities. In the case of *Dennis v. United States*, 171 F. 2d 986, the court disposes of this point as follows:

“Since one of the chief points raised by appellant is a general attack on the constitutionality of the creation of the Committee and of the resolutions, rules and statute authorizing its activities, it may be said at the outset that it is the self-same Committee, operating under the same set of resolutions, rules and statute as has been recently passed on by at least two Courts of Appeals, and in two of the cases by the Supreme Court of the United States in denying petitions for certiorari. See *Josephson v. United States*, 2 Cir., 1947, 165 F. 2d 82, certiorari denied, 1948, 333 U. S. 838, 68 S. Ct. 609, rehearing denied, 1948, 333 U. S. 858, 68 S. Ct. 731; *Barsky v. United States*, 1948, U. S. App. D. C., 167 F. 2d 241, certiorari denied, 68 S. Ct. 1511, 334 U. S. 843; and *Eisler v. United States*, 1948, U. S. App. D. C., 170 F. 2d 273.

(1) These cases were to the unanimous effect that the constitutionality of the authority of the Committee should be upheld, that the creation of the Committee and the matters confided to it for investigation were constitutional and lawful. * * *

However, the question has been set at rest by the recent decision of the Supreme Court in *Vern Smith v. The People of the State of California*. This was a petition for appeal to the Supreme Court of the United States in which the conviction of the appellant was sought to be reversed on the grounds that Senate Resolution No. 75 (the resolution appended to the complaint) was unconstitu-

tional. The Supreme Court of the United States in passing upon this petition ruled as follows: (69 S. Ct. 893)

“Appeal from the Superior Court in and for the County of Alameda, State of California.

April 25, 1949. Per Curiam: The appeal is dismissed for want of a substantial federal question.”

Further, the Supreme Court of the State of California, upon an attack upon the constitutionality of the resolution creating the “Tenney Committee,” ruled against plaintiff on this subject by denying his application for a writ of habeas corpus.

III.

Claims in the form of legal conclusions are made as to the motives of the Committee in subpoenaing the witness and holding the hearing. They appear to be (a) to suppress anyone criticizing the Committee and (b) to prevent plaintiff from petitioning the Legislature.

These Claims Cannot Be Sustained Factually

In respect to (a) above, no fact is alleged in the complaint from which this inference could be drawn. On the contrary plaintiff alleges that the Committee was under attack by certain members of the State Assembly. See Exhibit “F,” top of page 5. The court can take judicial notice of the fact that all such committees have been under constant attack and abuse by communists and communist inspired outlets. Such committees have likewise been criticized by others unconnected with the communistic movement.

In respect to (b) above, it is already covered in Subdivision 3 of I above.

These claims likewise cannot be sustained under the law.

In the case of *Dennis v. United States*, *supra*, the court said:

“* * * it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution.”

The decision in *United States v. Josephson*, 165 F. 2d 82, touches upon this subject and is well worth considering by the court.

In the oral argument we read to the court from *Eisler v. United States*, 170 F. 2d 273. The part which we read is found on page 278 and is as follows:

“* * * During the course of the trial defense counsel sought to introduce evidence to show that the Committee’s real purpose in summoning appellant was ‘to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress’ powers.’ The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees. * * *”

Although there may be no presumption as to the constitutionality of legislation enacted when civil rights are concerned, the fact still remains that the law is that there is a presumption that the action of the legislative body is legitimate. See cases heretofore cited and *McGrain v. Daugherty*, 273 U. S. 135.

IV.

State Senators Are Exempt From Civil Liability

Plaintiff's cause of action must fall for a further reason :

Members of the State Senate are privileged against civil liability arising out of the performance of legislative functions. The allegations in the complaint show and it is insisted by the plaintiff that the actions of the State Senate complained of in the present case were performed during a session of the Legislature and in the official discharge of the duties of the Senate under a law which plaintiff claims is unconstitutional.

The privileges secured to members of a legislative body, both state and federal, by which they are exempt from civil responsibility for their acts, resulting from the nature and in the execution of their office, are definite and positive. The leading case on this subject is *Kilbourn v. Thompson*, 103 U. S. 168. The discussion on this interesting subject starts on page 201. On page 203 the Supreme Court quotes with approval the language of Mr. Chief Justice Parsons in *Coffin v. Coffin*. The basis of the privilege is well expressed, as follows :

“* * * ‘These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. * * *’ ”

The subject is well discussed in *Barsky v. U. S.*, 167 F. 2d 241, at 250. This latter case also contains a splendid discussion of the entire subject matter of plaintiff’s law suit.

The privileges discussed in this subdivision are clearly inherent in state legislators. This is pointed out by the quotation cited with approval in *Kilbourn v. Thompson*, *supra*, at page 204 by Mr. Justice Story.

Section 1 of Article IV of the Constitution of the State of California provides: “The legislative power of the state shall be vested in a Senate and Assembly which shall be designated ‘The Legislature of the State of California,’ * * *.” The principles of law laid down in *Kilbourn v. Thompson* and the citations from *Coffin v. Coffin* and Chief Justice Story therein contained are inherent in the Legislature of the State of California. There is no limitation on this right in the State Constitution. The language of Chief Justice Gibson in *Collins v. Riley*, 24 C. 2d 912, commencing at the bottom of page 915, is particularly applicable:

“This argument overlooks the fact that our Constitution is not a grant of power but rather a limitation or restriction upon the powers of the Legis-

lature (In re Madera Irr. Dist., 92 Cal. 296 (28 P. 272, 675, 29 Am. St. Rep. 106, 14 L.R.A. 755); Macmillan Co. v. Clarke, 184 Cal. 491 (194 P. 1030, 17 A.L.R. 288); People ex rel. Smith v. Judge of the Twelfth District, 17 Cal. 547; Sheehan v. Scott, 145 Cal. 684 (79 P. 350); Fitts v. Superior Court, 6 Cal. 2d 230 (57 P. 2d 510); Mitchell v. Winnek, 117 Cal. 520 (49 P. 579)) and 'that we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.' (Fitts v. Superior Court, *supra*.) If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used."

A splendid discussion of the entire subject matter commences on page 403 of the decisions of the Supreme Court of the State of California in *Ex parte McCarthy*, 29 Cal. 395.

The law seems to be clear on the subject that members of the State Senate of California are exempt from any civil liability by reason of acts performed in their functions as state legislators. Other cases which touch upon this subject and many additional reasons for supporting the independence of the Legislature from interference by any other branch of the government are *Hearst v. Black*, 87 F. 2d 68, commencing at the bottom of page 71; *United States v. Bryan*, 72 F. Supp. at 58; *Cochran v. Couzens*, 42

F. 2d 783. This is a later case applying the reasoning in *Kilbourn v. Thompson* and *Coffin v. Coffin*, *supra*.

The same principle which exempts the state legislator when performing his legislative function also applies to judges of courts of record. A splendid discussion on this subject is found in the opinion of the Supreme Court of the United States in the leading case of *Spalding v. Vilas*, 161 U. S. 483.

A further observation on this subject: When the question was presented to counsel for plaintiff to discuss with the court this subject matter, counsel in his oral argument discussed everything except the exemption of state legislators from personal responsibility. No cases were cited by plaintiff inconsistent with the views here expressed.

It is respectfully submitted that the complaint should be dismissed with prejudice.

Dated: June 18, 1949.

/s/ HAROLD C. FAULKNER,
MELVIN, FAULKNER,
SHEEHAN & WISEMAN.
F. N. HOWSER,
J. FRANCIS O'SHEA,
FRED B. WOOD,

Attorneys for All Defendants in the Above-Entitled
Action Save and Except Defendant Elmer E.
Robinson.

[Endorsed]: Filed June 18, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
DENIAL OF DEFENDANTS' MOTIONS TO
DISMISS COMPLAINT

I.

Jurisdiction of the Federal Court in the Instant
Case.

By enacting section 43 of U.S.C. Title 8, Congress gave a right of action sounding in tort to every individual whose federal rights are infringed by any person acting under color of state law.

Picking v. Penn. Ry. Co.,
151 F. (2d) 240, 249.

Hague v. C.I.O.,
307 U. S. 496.

Screws v. United States,
325 U. S. 91.

Refoule v. Ellis,
74 F. Supp. 336.

The present action is predicated upon sections 43 and 47(3) of U.S.C. Title 8 and section 51, 52 of U.S.C. Title 18 which are construed together as being in *pari materia* with each other.

Picking v. Penn. Ry. Co.,
(supra) p. 248.

Hague v. C.I.O.,
(supra) pp. 531, 532.

United States v. Classic,
313 U. S. 299.

Screws v. United States,
(supra) pp. 98, 99.

Gordon v. Garrison,
(DC Ill. 1948) 77 F. Supp. 477:

Federal Court has jurisdiction by virtue of section 41(14) of Title 28 U.S.C. and hence diversity of citizenship and jurisdictional amount need not be alleged in complaint under section 43 and sections 47, 48 of Title 8 U.S.C.

II.

State Law Cannot Vest Any Person With Immunity
to Violate the Federal Rights of Another

The provisions of the federal Civil Rights Act are directed against anyone clothed with state authority who violates the federal rights of another by abuse of his state authority.

United States v. Classic,
(supra) p. 326:

“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”

Ex parte Virginia,
100 U. S. 339, 346, 347:

“* * * A State acts by its legislative, its executive or its judicial authority. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State. This must be so, the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it.”

In *Picking v. Penn. Ry. Co.*,
(*supra*) it was held:

Congress by enacting section 43 Title 8 U.S.C. intended to abrogate absolute privilege conferred by common law upon state judicial officers in performance of their duties to the extent indicated by said section.

Where a cause of action against the Governor of Pennsylvania based on his acting upon a warrant for extradition of Plaintiffs to New York, arose under section 47 Title 8 U.S.C., Pennsylvania statutes sections 192, 292 relieving the Governor of liability if he based his action upon advice of the Department of Justice could not relieve him from liability in the instant case.

See also: *Screws v. United States*, (supra) p. 114 and cases there cited Cf. notes 6-8.

“Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their malfeasance in office when it infringes constitutional rights. If that is a great power, it is one generated by the Constitution and the Amendments to which the states have assented and their officials owe prime allegiance.

“The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This, sections 19 and 20 have done in a manner history has long since validated.” (Rutledge, J. concurring in result, *Screws v. United States*, p133.)

Whether the federal law, as distinguished from state law, can vest such immunity in anyone exercising federal governmental power, is not in issue in this case, and therefore cases cited by defendants with respect to Congress or congressional committees cannot support the contention made by defendants on oral argument in this case that they are immune from the sanctions of the Civil Rights Act. To hold otherwise flies in the face of the purpose and the language of the Civil Rights Act, which has been applied not only to improper state legislation, but

also to members of the state judiciary, a state Governor, state school boards and state election officials as well as to peace officers of a state.

Wherever the federal Civil Rights Act applies, damages are recoverable as well as injunctive relief.

Picking v. Penn. Ry. Co.,
(supra).

Gordon v. Garrison,
(supra).

Chapman v. King,
154 F. (2d) 460.

Bomar v. Keyes,
162 F. (2d) 136.

Brickhouse v. Brooks,
165 F. 534.

III.

The Present Action Is Based on Intentional Abuse of State Authority to Deny a Political Opponent: (a) The Right of Free Speech, (b) the Right to Petition the Legislature for Redress of His Grievances, (c) the Right to a Fair and Impartial Hearing in Matters Concerning His Person, Privacy, Opportunity to Earn a Living and His Honor, and (d) the Equal Protection of the Laws.

All these rights are fundamental federal rights and as such are protected by the federal Constitution and the laws of the United States, and therefore within the provisions of sections 43 and 47(3).

Hague v. C.I.O.,
(supra).

United States v. Classic,
(supra).

Screws v. United States,
(supra).

The Complaint necessarily read as a whole alleges in substance that when the defendants became aware of plaintiff's political criticism voiced in his petition for the purpose of persuading the legislators of California to discontinue further appropriations for the Tenney Committee, they abused their state authority as members of the criticized legislative committee by using said power to silence plaintiff, vilify his character, deter him from further action, this by attempting to cause the initiation of a criminal prosecution for perjury by state telegrams to various district attorneys, by compelling his attendance at an unfair and partial hearing of said committee, by citing him for contempt at such hearing on his refusal to answer questions on the grounds raised by him at said hearing and pleaded by reference in the Present Complaint, and by compelling him to stand trial on a criminal contempt charge after having suffered imprisonment based on such charge.

A clear answer to defendants' question at the oral argument on their motions to dismiss in this case as to how free speech and freedom to petition the Legislature were violated by the conduct of defendants

alleged in the Complaint, is that these freedoms were infringed upon by more subtle and artful methods than putting a gag in one's mouth or snatching a petition from one's hands; not only is it the supreme law of the land that these freedoms can be effectively exercised only in the absence of State suppression, but it is a fundamental principle upon which our democracy was founded.

If he who dares to speak his mind is for that reason subject to the treatment accorded plaintiff by state authority without such authority having violated the federal law on the pleaded facts of the instant case, then those freedoms become words without substance.

Thornhill v. Alabama,
310 U. S. 88, 97.

Thomas v. Collins,
323 U. S. 516, 530.

Jones v. Securities Comm.,
298 U. S. 1, 26.

Schneiderman v. United States,
320 U. S. 118.

West Va. State Bd. of Ed. v. Barnette,
319 U. S. 624.

Hannegan v. Esquire,
327 U. S. 146.

Terminiello v. City of Chicago,
93 L. Ed. Adv. Op. 55.

IV.

It Is Irrelevant Whether the California Legislature Was or Was Not in Session at the Time of the Tenney Committee Hearing in Question and Whether or Not Said Committee Can Properly Hold Hearings Between Sessions of the Legislature.

He who is clothed with state authority and purports to exercise the same is responsible under the Civil Rights Act even if the wrong done exceeded the state power vested in the wrongdoer.

Home Tel. & Tel. Co. v. Los Angeles,
227 U. S. 278, 287.

Screws v. United States,
(supra) pp. 110, 114, 115.

United States v. Classic,
(supra) p. 326.

As a matter of fact, if it be assumed that the committee in question could not lawfully hold the hearing complained of as defendants have urged on this Court, than plaintiff would have to show no more than this fact to conclusively establish a violation of section 43 of the Civil Rights Act by defendants.

V.

The Issue of the Constitutionality of the California Senate Resolution Creating the Tenney Committee Is Immaterial in the First Instance and

Need Not Be Gone Into Before the Facts as to Other Issues Are Determined.

United States v. C.I.O.,
335 U. S. 106, 110, 124, 125.

Rescue Army v. Municipal Court,
331 U. S. 549, 568, 569.

Ashwander v. T. V. A.,
297 U. S. 288, 346-348 and cases there cited.

Williams v. Miller,
(DC Cal. 1942) 48 F. Supp. 277; affirmed
317 U. S. 599, holding:

In considering the sufficiency of a complaint as raising substantial federal question within the jurisdiction of the federal court, essential facts should be determined before passing upon grave constitutional questions.

For another aspect of this question,
See: *Anderson v. Meyers*,
182 F. 233; affirmed 238 U. S. 368.

VI.

Liability of Defendant Robinson

Plaintiff's cause of action under section 43 extends to any person who, without himself being clothed with state authority, engaged in a conspiracy with others so clothed and acting under color of state law.

Downs v. United States,
3 F (2d) 855, 857.

Picking v. Penn. Ry. Co.
(supra).

Johnson v. United States,
158 F. 69.

“A defendant, therefore, may be convicted of a conspiracy to commit an offense when in the nature of things he could not have committed the offense himself, if it be an offense which one of his co-conspirators could commit.”

See also: 11 Am. Jur. 547 footnote 7; 5 A.L.R. 787; 74 A.L.R. 1114.

In Picking v. Penn Ry Co., 5 F. R. D. 76 at 77 on motion for a more specific statement the Court stated the rule as follows:

“In the complaint in a civil conspiracy case such as this in order to be sufficiently specific and definite it should be alleged: (1) That the defendants conspired to do an unlawful act; (2) facts as to the acts performed by each defendant in furtherance of the conspiracy which acts were not privileged or compelled by law; (3) facts as to the overt acts in pursurance of the conspiracy done by certain of the alleged conspirators; (4) facts from which the Court can see, if the facts are true, the damage which would naturally or possibly result from the acts stated.”

Applying these criteria to the instant case:

By paragraphs 2, 3, 5, and 8 plaintiff has incorporated by reference Exhibits A, B, C, D, E, and F which are attached to and pleaded as part of the instant complaint. Paragraph 14 of the present complaint sets out the civil conspiracy coupled with

paragraph 13 therein. (Requirement #1.) Paragraphs 3 up to and including 14 satisfy requirement #2 in the Picking case. Paragraphs 4, 5, 6, 7, 8, 13, and 14 meet requirement #3 as to defendant Robinson. And paragraph 10 and the whole complaint comply with requirement #4 hereinabove set forth. See also in particular pages 15 up to and including 17, plaintiff's Exhibit F, re defendant Robinson.

All of the defendants including defendant Robinson, since they engaged in such conspiracy are liable in damages also under section 47(3).

Picking v. Penn Ry. Co.,

5 F. R. D. 76, 77.

“If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. It is not essential that each conspirator have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan.”

VII.

State Court Proceedings Prior to This Action

On oral argument on their motions to dismiss, defendants underline the fact that a petition by plain-

tiff for an extraordinary writ was denied by the California Supreme Court.

The actual facts in regard to said writ are as follows: After plaintiff's arrest and incarceration pursuant to the criminal contempt charge filed on behalf of The Tenney Committee, and prior to standing trial on said charge, plaintiff asked the California Supreme Court for an extraordinary writ in the nature of habeas corpus to restore him to his liberty without the necessity of standing trial. Since the California Supreme Court would not go into the important constitutional questions raised by plaintiff's petition prior to a determination of the facts at trial, the extraordinary relief was denied. Obviously this denial by the Court decided nothing more than plaintiff's right to relief by extraordinary process before determination of the facts at trial.

Thus the trial took place which resulted in a hung jury with the count of 11 to 1 for acquittal of this plaintiff, 11 of the jurors stating that they did not believe The Tenney Committee hearing in question was either fair or impartial.

Wherefore, it is respectfully submitted that the defendants' motions to dismiss Complaint, and each of them, be denied.

Dated: San Francisco, California, June 16, 1949.

/s/ MARTIN J. JARVIS,

/s/ RICHARD O. GRAW.

/s/ ELMER P. DELANY,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF
DEFENDANT ELMER E. ROBINSON

Defendant Elmer E. Robinson files this supplemental memorandum in support of his motion to dismiss plaintiff's complaint.

It is, and has been, this defendant's position that the complaint fails to allege a single fact from which it can be remotely inferred that any act of this defendant deprived plaintiff of any civil rights.

It is a strange line of reasoning to propose that plaintiff's freedom of speech was curtailed because defendant Robinson exercised his right of free speech in answering the statements made by plaintiff.

Plaintiff appears to argue that he alone is entitled to the right to freedom of speech, and that any person undertaking to answer him is violating this right.

It is submitted that this defendant at no time did anything different than would be expected of any normal person desiring to be heard in his own defense in any forum where his honor or integrity is attacked.

The supplemental brief of the other defendants fully points out the deficiencies in plaintiff's complaint, and correctly points out the legal and factual barriers to plaintiff's right to recover damages.

In addition to the points raised by the other defendants, this defendant again calls the court's attention to his status as a private citizen as pleaded in plaintiff's complaint.

At the hearing on June 13th, plaintiff's counsel indicated that they faced a substantial legal problem so far as the defendant Elmer E. Robinson was concerned. This problem arises from the law that the Federal Government is without power to enact legislation granting a cause of action against an individual, who violates a citizen's civil rights, where such individual does not act under color of State authority. *Powe vs. United States*, 109 Fed. (2) 147.

Plaintiff endeavors however, to hold the defendant, Elmer E. Robinson on a theory that even though he would not be responsible acting alone, he is responsible if he conspires with persons who are acting under color of State authority. In support of this position, counsel for plaintiff again cited the court to the cases referred to in their memorandum in support of the Order to Show Cause for a preliminary injunction in the previous action No. 28729H in the above court.

These cases merely hold that A may be criminally guilty of conspiring with B to commit a criminal act, even though A could not commit the act himself. For example, in the *Downs* case, 3 Fed. (2) 855, it was held that officers of the law could be convicted of conspiring with two other persons to bribe themselves even though they could not personally be convicted of the substantive crime of offering themselves a bribe. In the *Rabinowitch* case, 238 U. S. 78, six persons were indicted for conspiracy to violate the United States Bankruptcy Act

relating to the concealing of property. Three of the persons owned the property; three did not. However, the court properly held that all six could be convicted of conspiracy to conceal the property.

These cases cited by counsel are criminal cases, and obviously not applicable in the instant case, because in each of the cases cited, a conspiracy to commit a particular crime was a separately recognized offense within itself.

Wherefore, defendant Elmer E. Robinson respectfully submits that plaintiff's complaint be dismissed.

McGUIRE & LAHANIER.

By /s/ W. A. LAHANIER,

Attorney for Defendant

Elmer E. Robinson.

[Endorsed]: Filed June 20, 1949.

[Title of District Court and Cause.]

ORDER

Defendants' Motion to Dismiss having been briefed, argued, and submitted for ruling,

It Is Ordered that the Motion be and the same hereby is Granted.

Dated:

/s/ GEORGE B. HARRIS,

United States District Judge.

Dennis v. U. S., 171 F. 2d. 986; Smith v. California, 199 Pacific 2d, 325 certiorari denied 336 U. S.

957; Eisler v. U. S., 170 F. 2d 273; Barsky v. U. S., 167 F. 2d 241, 250; Keppleman v. Upton, 84 F. Supp. 478.

[Endorsed]: Filed November 9, 1949.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 28711H

WILLIAM PATRICK BRANDHOVE,
Plaintiff,

vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES, a California legislative
committee; HUGH M. BURNS; NELSON S.
DILWORTH; FRED H. KRAFT; LOUIS G.
SUTTON; CLYDE A. WATSON; and
ELMER E. ROBINSON,

Defendants.

JUDGMENT ON MOTIONS TO DISMISS

This cause came on to be heard on defendants'
motions to dismiss and the Court having granted
said motions as to each and all the defendants,

It is hereby Ordered, Adjudged and Decreed that

the action be dismissed on the merits as to each and all of the defendants, and that defendants recover their costs.

Dated: San Francisco, California, November 16, 1949.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form:

/s/ HAROLD C. FAULKNER,
/s/ W. A. LAHANIER,
Defendants' Attorneys.

[Endorsed]: Filed November 17, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that William Patrick Brandhove, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 16, 1949.

Dated: San Francisco, California, November 22, 1949.

/s/ MARTIN J. JARVIS,
/s/ RICHARD O. GRAW,
/s/ ELMER P. DELANY,
Attorneys for Appellant.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

STATEMENT OF APPELLANT OF THE
POINTS ON APPEAL ON WHICH HE
INTENDS TO RELY

Plaintiff and appellant hereby sets forth the following points on which he intends to rely on appeal:

1. The Court erred in granting the motion to dismiss made by each and all of the defendants, excepting defendant Robinson, and erroneously dismissed the action as to said defendants.

A. Plaintiff's complaint states a cause of action for damages under the Civil Rights Act against said defendants.

B. State law cannot vest any person with immunity to violate the federal rights of another.

C. The resolution of the California State Senate creating the defendant committee known as The Senate Fact-Finding Committee On Un-American Activities is unconstitutional.

2. The Court erred in granting the motion to dismiss made by defendant Elmer E. Robinson and erroneously dismissed the action as to said defendant.

a. Points A, B and C *supra*.

b. Plaintiff's cause of action under the Civil Rights Act extends to any person who, without himself being clothed with state authority, engaged in

a conspiracy with others so clothed and acting under color of state law.

Dated: San Francisco, California, November 30, 1949.

/s/ MARTIN J. JARVIS,

/s/ RICHARD O. GRAW,

/s/ ELMER P. DELANY,

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Damages Under Civil Rights Act
—Contains Exhibits A, B, C, D, E and F.

Motion to Dismiss Complaint—By Defendants
other than Elmer E. Robinson.

Memorandum of Points and Authorities on Motion to Dismiss—By Defendants other than Elmer E. Robinson.

Motion to Dismiss Complaint—By Elmer E. Robinson.

Memorandum of Points and Authorities on Motion to Dismiss—By Elmer E. Robinson.

Plaintiff's Memorandum of Points and Authorities In Support of Denial of Defendants' Motions to Dismiss Complaint.

Supplemental Memorandum of Defendant Elmer E. Robinson.

Memorandum of Authorities Supplementing Oral Argument on Motion to Dismiss—By Defendants other than Elmer E. Robinson.

Order Granting Defendants' Motion to Dismiss.

Judgment on Motions to Dismiss.

Notice of Appeal.

Designation of Record on Appeal.

Statement of Appellant of Points on Appeal on Which He Intends to Rely.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of December, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12430. United States Court of Appeals for the Ninth Circuit. William Patrick Brandhove, Appellant, vs. Jack B. Tenney; The Senate Fact Finding Committee on Un-American Activities, a California legislative committee; Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton, Clyde A. Watson and Elmer E. Robinson, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: December 16, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit
No. 12430

WILLIAM PATRICK BRANDHOVE,
Appellant.

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, a California legislative committee; HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON, CLYDE A. WATSON and ELMER E. ROBINSON,

Appellees.

DESIGNATION OF RECORD ON APPEAL
AND STATEMENT OF POINTS

The Clerk will please prepare the Record on Appeal and include there in the following:

1. Plaintiff's complaint.
2. Motion to dismiss complaint by defendants Jack B. Tenney; The Senate Fact-Finding Committee On Un-American Activities, a California legislative committee; Hugh M. Burns, Nelson S. Dilworth; Fred H. Kraft; Louis G. Sutton; Clyde A. Watson, together with said defendants' Memorandum of Points and Authorities on Motion to Dismiss.
3. Motion to Dismiss complaint by defendant Elmer E. Robinson together with said defendant's Memorandum of Points and Authorities on Motion to Dismiss.

4. Plaintiff's Memorandum of Points and Authorities in support of Denial of defendants' Motions to Dismiss Complaint.

5. Supplemental Memorandum of defendant Elmer E. Robinson.

6. Memorandum of Authorities (by defendants other than Elmer E. Robinson) Supplementing Oral Argument on Motion to Dismiss.

7. Order granting defendants' Motion to Dismiss dated November 9, 1949.

8. Judgment on Motions to Dismiss.

9. Notice of Appeal with date of filing.

10. This Designation.

11. Statement of Appellant of the Points on Appeal on which he intends to rely.

Statement of Points

Appellant hereby adopts the Statement of Appellant of the Points on Appeal on Which He Intends to Rely heretofore filed in the District Court of the United States for the Northern District of California, Southern Division in this action.

Dated: San Francisco, California, December 15, 1949.

/s/ MARTIN J. JARVIS,

/s/ RICHARD O. GRAW,

/s/ ELMER P. DELANY,

Attorneys for Appellant.

Affidavit of Service by mail attached.

[Endorsed]: Filed December 16, 1949.

No. 12,430

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,
vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES, (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON, CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

MARTIN J. JARVIS,
RICHARD O. GRAW,
De Young Building, San Francisco 4, California,
ELMER P. DELANY,
1095 Market Street, San Francisco 3, California,
Attorneys for Appellant.

FEB 14 1950

Subject Index

	Page
Jurisdictional statement	1
Statutes involved	2
Statement of the case.....	3
Argument and statement of points.....	8

I.

The court erred in granting the motion to dismiss made by each and all of the appellees, excepting appellee Robinson, and erroneously dismissed the action as to said appellees (Point 1)	8
A. Appellant's complaint states a cause of action for damages under the Civil Rights Act against said appellees	8
B. State law cannot vest any person with immunity to violate the federal rights of another.....	11
C. The resolution of the California State Senate creating the appellee committee known as the Senate Fact-Finding Committee on Un-American Activities is unconstitutional	17

II.

The court erred in granting the motion to dismiss made by appellee Elmer E. Robinson and erroneously dismissed the action as to said appellee (Point 2).....	18
a. Points A, B and C, supra.....	18
b. Appellant's cause of action under the Civil Rights Act extends to any person who, without himself being clothed with state authority, engaged in a conspiracy with others so clothed and acting under color of state law	18
Conclusion	19

Table of Authorities Cited

Cases	Pages
Barsky v. United States, 167 F. (2d) 241.....	14, 15
Connally v. General Construction Co., 269 U.S. 385.....	17
Dennis v. United States, 171 F. (2d) 986.....	14, 15
Downs v. United States, 3 F. (2d) 855.....	18
Eisler v. United States, 170 F. (2d) 273.....	14, 15
Ex parte Virginia, 100 U.S. 339.....	12
Gordon v. Garrison, 77 F. Supp. 477.....	9
Hague v. C.I.O., 307 U.S. 496.....	9
Hannegan v. Esquire, 327 U.S. 146.....	11
In re Di Torio, 8 F. (2d) 279.....	17
Johnson v. United States, 158 F. 69.....	18
Jones v. Securities Comm., 298 U.S. 1.....	11, 16
Keppleman v. Upton, 84 F. Supp. 478.....	14
Kilbourn v. Thompson, 103 U.S. 168.....	16
Marshall v. Gordon, 243 U.S. 521.....	16
McGrain v. Daugherty, 273 U.S. 135.....	15
Perez v. Sharp, 32 Cal. (2d) 711, 198 Pac. (2d) 17.....	17
Picking v. Penn. Ry. Co., 151 F. (2d) 240.....	9, 13, 18
Picking v. Penn. Ry. Co., 5 F.R.D. 76.....	19
Re Chapman, 166 U.S. 661.....	16
Refoule v. Ellis, 74 F. Supp. 336.....	9
Rescue Army v. Municipal Court, 331 U.S. 549.....	17
Schneiderman v. United States, 320 U.S. 118.....	11
Screws v. United States, 325 U.S. 91.....	9, 12, 13
Small Co. v. American Sugar Refining Co., 267 U.S. 233....	17
Smith v. California, unreported, cert. denied 336 U.S. 957..	14, 16

Pages

Terminiello v. City of Chicago, 93 L. Ed. Adv. Op. 55.	11
Thomas v. Collins, 323 U.S. 516.	11
Thornhill v. Alabama, 310 U.S. 88.	11
United States v. C.I.O., 335 U.S. 106.	17
United States v. Classic, 313 U.S. 299.	9, 12
West Va. State Bd. of Ed. v. Barnette, 319 U.S. 624.	11

Codes and Statutes

18 U.S.C., Sections 51 and 52	9
28 U.S.C., Section 1291	3
28 U.S.C., Section 1343(1), (3)	3
Pennsylvania Statutes, Sections 192, 292	13
Rev. Stat., Section 1979, from Act of Apr. 20, 1871, c. 22, Section 1, 17 Stat. 13, 8 U.S.C., Section 43.	1, 2, 9, 13
Rev. Stat., Section 1980, from Acts of July 31, 1861, c. 33, 12 Stat. 284; Apr. 20, 1871, c. 22, Section 2, 17 Stat. 13; Title 8 U.S.C. 47(3)	1, 2, 9, 19

Texts

11 Am. Jur. 547, footnote 7.	18
5 A.L.R. 787	18
74 A.L.R. 1114	18

No. 12,430

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,
vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES, (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON, CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Northern District of California, Southern Division, dismissing appellant's complaint for damages under the Civil Rights Act, (Rev. Stat. §§ 1979 and 1980, 8 U.S.C. §§ 43 and 47(3)) as to each and all of the appellees.

Jurisdiction below was based on 28 U.S.C. § 1343 (1), (3). Jurisdiction of this Court is conferred by 28 U.S.C. § 1291.

STATUTES INVOLVED.

(1) Rev. Stat. § 1979 from Act of Apr. 20, 1871 c. 22 § 1, 17 Stat. 13; Title 8 U.S.C. section 43:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

(2) Rev. Stat. § 1980 from Acts July 31, 1861 c. 33 12 Stat. 284; Apr. 20, 1871 c. 22 § 2, 17 Stat. 13; Title 8 U.S.C. 47(3):

“Conspiracies; to deprive citizen of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or

if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or in property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE.

On January 28, 1949, appellant, William Patrick Brandhove circulated a petition entitled: "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)" among the members of the California Legislature at the State capitol in Sacramento. (T.R. 4, 18-22). The subject matter of said petition was stated therein as follows:

"I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as

an instrument to smear Congressman Franck R. Havenner as a "Red" when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end" (T.R. 4-5, 18-22).

In support of this statement said petition referred to a number of incidents to substantiate this charge (T.R. 19-20), and the stated purpose of said petition was to persuade the California Legislature to discontinue further appropriations of funds for The Tenney Committee (T.R. 5, 18-22).

While appellant was engaged in circulating said petition, as aforesaid, a subpoena was served upon him ordering him to appear as a witness at a hearing to be held before The Tenney Committee on the following day, to wit: January 29, 1949. (T.R. 5, 22-23). No reference was made in said subpoena to the purpose or object of said hearing, or of the testimony required thereat (T.R. 5, 22-23). Before the service of said subpoena on appellant, but after the content of said circulated petition had become known to appellee, Jack B. Tenney, said appellee, the chairman of the criticized committee, discussed with appellee Elmer E. Robinson the best way and means of defeating the effect and purpose of said petition and they then and there agreed that the aforementioned hearing should be held, and that appellee, Elmer E. Robinson should appear at said hearing as

a voluntary witness to deny the truth of the contents of appellant's petition (T.R. 5-6, 45-47).

On the same day, to wit, January 28, 1949, and in order to silence appellant and defeat the effect of his said petition, appellees Jack B. Tenney and Hugh M. Burns, chairman and vice-chairman respectively of The Tenney Committee, with regard to appellant's petition, sent State telegrams to two District Attorneys of the State of California, demanding on behalf of said Committee that appellant be prosecuted for perjury (T.R. 6, 23-25).

A hearing was held by The Tenney Committee on the next day, to wit, January 29, 1949, at which all appellees, excepting Elmer E. Robinson, were sitting as members of said Committee, and at which appellee Elmer E. Robinson, as agreed with the chairman of said Committee, appeared as a voluntary witness (T. R. 6, 27-28, 47). At said hearing appellee Elmer E. Robinson was permitted to make a lengthy unsworn statement first (T.R. 7, 45-48) and after having been sworn as a voluntary witness was given unbridled discretion in conducting a self justification of the charges contained in appellant's said petition (T.R. 7, 50-67). Pursuant to the subpoena served upon him, appellant appeared at said hearing and after answering questions as to his identity (T.R. 28) objected to the committee's further questions on the ground that the Committee was not acting for a legislative purpose at that hearing but was attempting to acquit itself of the charges made in appellant's petition to

the California Legislature and was therefore then acting as judge and accused in the same case thereby exceeding its powers and jurisdiction. (T.R. 8, 28-32, 35-38). These objections were overruled by The Tenney Committee (T.R. 32) and appellant was then asked a great number of questions with regard to his personal affairs and acquaintances to which said Committee had previously obtained sworn answers from him (T.R. 7, 38-41, 42-43). At said hearing appellee Jack B. Tenney, as chairman of said Committee, read into the record of the hearing a false alleged criminal record of appellant and a newspaper article wherein an affidavit of appellant was called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee to appellee Jack B. Tenney "that Mr. Brandhove (appellant) was a liar" (T.R. 7, 43-45, 74). Furthermore, at said hearing appellant's counsel, although he was not summoned was called as a witness by said Committee and interrogated at length about his private affairs, and when he referred to decisions of the United States Supreme Court supporting the objections raised by appellant against said hearing and supporting appellant's refusal to answer questions thereat, said counsel was threatened with expulsion from the hearing room (T.R. 7-8, 48-50, 34-35). At said hearing The Tenney Committee, by unanimous vote of its members, resolved that a criminal complaint be filed in the proper Court at Sacramento, California, because of appellant's refusal to answer questions thereat (T.R. 8, 42). Such complaint charging appel-

lant with the misdemeanor of violating section 9412 of the Government Code of the State of California, signed and sworn to by appellee, Jack B. Tenney, was filed on January 31, 1949, in the Municipal Court of the City of Sacramento (T.R. 8, 74). Upon said complaint, appellant was arrested and imprisoned from the 1st day of February to the 15th day of February, 1949 (T.R. 8). Appellant was tried with jury on said complaint on February 28, 1949, up to and including March 5, 1949 on which latter date the jury announced that the jurors could not agree on a verdict, the count being eleven (11) for acquittal and one (1) for conviction (T.R. 9). Said cause was continued to March 9, 1949, on which date on motion of the prosecuting attorney the charge was dismissed and the appellant discharged. Appellant committed no public offense at said hearing since the hearing was not held for a legislative purpose and was not a fair and impartial hearing as required under the 14th Amendment to the United States Constitution and under the resolution creating The Tenney Committee and that the questions asked of appellant were not material or proper as required by section 9412 of the California Government Code (T.R. 8-9). After appellant's discharge from custody, he brought this action for damages under the Civil Rights Act alleging that the acts of the appellees above set forth were done or participated in with malice and intent to intimidate and silence appellant and to deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legisla-

ture for redress of grievances; that he was deprived of the equal protection of the laws, due process of law and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law (T.R. 10); that the acts of all appellees, except appellee Robinson, were done under color of State authority; that all appellees, including appellee Robinson, conspired for the aforesaid purposes and acted as above set forth in furtherance of such conspiracy (T.R. 10).

Upon appellees' motions to dismiss appellant's complaint (T.R. 76-85, 89-97) the District Court made its order granting said motions (T.R. 124-125) and entered judgment dismissing appellant's action on the merits (T.R. 125-126).

This appeal is from said judgment (T.R. 126).

ARGUMENT.

I.

THE COURT ERRED IN GRANTING THE MOTION TO DISMISS
MADE BY EACH AND ALL OF THE APPELLEES, EXCEPT-
ING APPELLEE ROBINSON, AND ERRONEOUSLY DISMISSED
THE ACTION AS TO SAID APPELLEES.

A. Appellant's complaint states a cause of action for damages under the Civil Rights Act against said appellees.

The Present Action is Based on Intentional Abuse of State Authority to Deny a Political Opponent:
(a) The Right of Free Speech, (b) the Right to
Petition the Legislature for Redress of His

Grievances, (c) the Right to a Fair and Impartial Hearing in Matters Concerning his Person, Privacy, Opportunity to Earn a Living and His Honor, and (d) the Equal Protection of the Laws.

All these rights are fundamental federal rights and as such are protected by the Federal Constitution and the laws of the United States. They are therefore within the provisions of sections 43 and 47(3) of Title 8 U.S.C.

See also: sections 51 and 52 of Title 18 U.S.C. which are construed as being *in pari materia* with sections 43 and 47(3) Title 8 U.S.C.

Picking v. Penn. Ry. Co., 151 F. (2d) 240, 248.

By enacting section 43 of U.S.C. Title 8, Congress gave a cause of action sounding in tort to every individual within the jurisdiction of the United States whose federal rights are infringed by any person acting under color of state law.

Hague v. C.I.O., 307 U.S. 496;

United States v. Classic, 313 U.S. 299;

Screws v. United States, 325 U.S. 91;

Picking v. Penn. Ry. Co., 151 F. (2d) 240;

Refoule v. Ellis, 74 F. Supp. 336;

Gordon v. Garrison, 77 F. Supp. 477.

The complaint, necessarily read as a whole, alleges in substance that when said appellees became aware of appellant's political criticism voiced in his petition to persuade the California legislators to discontinue

further appropriations for The Tenney Committee, they abused their State authority as members of the criticized legislative committee for the purpose of silencing appellant and deterring him from further action to the same end. According to the allegations of appellant's complaint said appellees did this by various connected actions for the same end to wit: sending State telegrams to various district attorneys urging them to prosecute appellant for perjury for circulating said petition (T.R. 6, 23-25); holding an unfair and partial hearing of The Tenney Committee (T.R. 6-8, 26-75); compelling appellant's attendance at said hearing without prior disclosure of the purpose thereof (T.R. 5, 22-23); propounding thereat questions to him and his counsel which were not pertinent to any legislative purpose (T.R. 9, 32-50); citing appellant for contempt on his refusal to answer the questions propounded to him based upon proper objections by himself and his counsel raised at said hearing (T.R. 8, 30-32, 35-38); threatening appellant's counsel with expulsion from the hearing room (T.R. 8, 34-35); reading into the record at said hearing a false alleged criminal record of appellant and a newspaper article calling an affidavit of appellant "a tissue of lies" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee that appellant was "a liar" (T.R. 7, 43-45, 73-74); and causing appellant's arrest and imprisonment and compelling him to stand trial on a criminal contempt charge (T.R. 8-9).

This treatment of appellant under color of State authority violated appellant's constitutional rights of free speech and of freedom to petition the legislature for a redress of his grievances, and deprived him of a fair and impartial hearing and of the equal protection of the laws (T.R. 10).

If he who dares to speak his mind is for that reason subjected to the treatment accorded appellant by State authority without such authority having violated the federal law on the pleaded facts of the instant case, then those freedoms become words without substance.

Thornhill v. Alabama, 310 U.S. 88, 97.

Thomas v. Collins, 323 U.S. 516, 530;

Jones v. Securities Comm., 298 U.S. 1, 26;

Schneiderman v. United States, 320 U.S. 118;

West Va. State Bd. of Ed. v. Barnette, 319 U.S. 624;

Hannegan v. Esquire, 327 U.S. 146;

Terminiello v. City of Chicago, 93 L. Ed. Adv. Op. 55.

B. State law cannot vest any person with immunity to violate the federal rights of another.

It is the essence of the provisions of the Civil Rights Act to protect all individuals within the jurisdiction of the United States from any exercise of State authority in violation of the federal rights of that individual.

It is immaterial whether the person who violates the federal rights of another by exercise of his State authority acts in conformity with State law.

United States v. Classic, supra, 313 U. S. 299, 326:

“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”

Ex parte Virginia, 100 U.S. 339, 346, 347:

“* * * A State acts by its legislative, its executive or its judicial authority. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State’s power, his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it.”

See also:

Screws v. United States, 325 U.S. 91, 114 and 133.

“Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their

malfeasance in office when it infringes constitutional rights. If that is a great power, it is one generated by the Constitution and the Amendments to which the states have assented and their officials owe prime allegiance.

The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This, sections 19 and 20 have done in a manner history has long since validated." (Rutledge, J., concurring in result, *Screws v. United States*, p. 133).

In *Picking v. Penn. Ry. Co.*, supra, 151 F. (2d) 240, it was held:

Congress by enacting section 43 Title 8 U.S.C. intended to abrogate absolute privilege conferred by common law upon state judicial officers in performance of their duties to the extent indicated by said section (p. 250), and further: where a cause of action against the Governor of Pennsylvania based on his acting upon a warrant for extradition of Plaintiffs to New York arose under section 47 Title 8 U.S.C., Pennsylvania statutes sections 192, 292 relieving the Governor of liability if he based his action upon advice of the Department of Justice could not relieve him from his responsibility under the Civil Rights Act (p. 251).

The District Court has differed from the principle of responsibility for violations of federal rights as recognized in these decisions.

In its order granting appellees' motion to dismiss the District Court has referred to the following authorities: *Dennis v. United States*, 171 F. (2d) 986; *Smith v. California*, unreported, certiorari denied 336 U.S. 957; *Eisler v. United States*, 170 F. (2d) 273; *Barsky v. United States*, 167 F. (2d) 241, 250; *Keppleman v. Upton*, 84 F. Supp. 478. All these cases, with the sole exception of *Smith v. California*, supra, relate to the exercise of federal governmental power by Congressional Committees or public officers of the United States. The present case, however, does not relate to the exercise of governmental power by a Congressional Committee or by an officer of the federal government; appellant here seeks relief from the abuse of State power. There is a fundamental difference between the rights conferred upon a person by the Civil Rights Act against the abuse of State power and his remedies against abuse of Federal power by Congressional Committees or public officers of the Federal government. While the Civil Rights Act gives a cause of action for damages against anyone acting under color of State law who has violated Federal rights of the complaining party, a rule of immunity has been applied to Congressional Committees and Federal officers, which has been stated in *Barsky v. United States*, 167 F. (2d) 241, 250, as follows:

“The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. The courts have no authority to speak or act upon the conduct by the legislative branch of its

own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.' The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and Administrative, from liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammelled freedom of legislative and administrative activity, within the respective power of the legislative and the executive."

Since the Civil Rights Act and the decisions of the United States Supreme Court and other Federal Courts construing it make it clear that the Federal rights of citizens protected by that act shall not give way to any power or immunity which the State law may attempt to confer upon any State body or State official, it would therefore confuse the legal issues of the present case to discuss cases concerning Congressional Committees such as *Barsky v. United States*, supra; *Dennis v. United States*, supra; and *Eisler v. United States*, supra; or *Keppleman v. Upton*, supra, 84 F. Supp. 478, which latter case related to a suit for damages against officers of the United States Armed Forces and, in addition, also involved matters of military discipline. It may be said in passing, however, that even as to the power of Congressional Committees it was stated in *McGrain v. Daugherty*, 273 U.S. 135, 175-176:

“We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson*¹ and *Marshall v. Gordon*² point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *Re Chapman*³ that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.”

See also: *Jones v. Security Exchange Commission*, 298 U.S. 1, 26, holding that a citizen, when interrogated about his private affairs, had the right before answering, to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, may not be compelled to answer.

The only case cited in the order of the District Court which refers to State as distinguished from Federal power is *Smith v. California*, unreported, cert. denied, 336 U.S. 957, holding under the facts of that case that the resolution creating The Tenney Committee did not violate the Federal Constitution. As this decision does not relate to an abuse of State power in violation of the rights protected by the Civil Rights Act, it is no authority for the proposition that the State can confer immunity on any State

¹103 U.S. 168.

²243 U.S. 521.

³166 U.S. 661.

body or State official from actions for damages under said Federal Statute.

- C. The resolution of the California State Senate creating the appellee committee known as the Senate Fact-Finding Committee on Un-American Activities is unconstitutional.

The California Senate resolution creating The Tenney Committee (T.R. 12-18) violates the due process clause of the Federal Constitution in that it lacks the degree of certainty which is required in a statute or other rule of state law, affecting fundamental rights.

Connally v. General Construction Co., 269 U.S. 385, 391;

Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239;

In re Di Torio, 8 F. (2d) 279, 281;

Perez v. Sharp, 30 Cal. (2d) 711, 728, 198 Pac. (2d) 17.

The issue of the constitutionality of said resolution is raised however only in the alternative so that it need not be gone into before the other issues are determined, since it is clear that said Committee acting under said resolution acts under color of state law regardless of the constitutionality of that resolution.

See:

United States v. C.I.O., 335 U.S. 106, 110, 124, 125;

Rescue Army v. Municipal Court, 331 U.S. 549, 568, 569.

II.

THE COURT ERRED IN GRANTING THE MOTION TO DISMISS MADE BY APPELLEE ELMER E. ROBINSON AND ERRONEOUSLY DISMISSED THE ACTION AS TO SAID APPELLEE.

- a. Points A, B and C *supra*.
- b. Appellant's cause of action under the Civil Rights Act extends to any person who, without himself being clothed with State authority, engaged in a conspiracy with others so clothed and acting under color of State law.

Appellant alleged in his complaint that appellee Elmer E. Robinson in preparation of the improper hearing and during said hearing conspired with the other appellees to deprive appellant of his federal rights (T.R. 5, 6, 7 and 10) and acted in furtherance of this conspiracy in the manner therein set forth (T.R. 10, 45-48, 50-67).

Appellant's cause of action under Section 43 Title 8 U.S.C. extends to any person who, without himself being clothed with state authority, engaged in a conspiracy with others so clothed and acting under color of state law.

Downs v. United States, 3 F. (2d) 855, 857;

Picking v. Penn. Ry. Co., 151 F. (2d) 240.

In *Johnson v. United States*, 158 F. 69, it was held:

“A defendant, therefore, may be convicted of a conspiracy to commit an offense when in the nature of things he could not have committed the offense himself, if it be an offense which one of his coconspirators could commit.”

See also: 11 Am. Jur. 547, footnote 7; 5 A.L.R. 787; 74 A.L.R. 1114.

All of the defendants including defendant Robinson, since they engaged in such conspiracy, are liable in damages also under Title 8 Section 47(3).

Picking v. Penn. Ry. Co., 5 F.R.D. 76, 77.

“If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. It is not essential that each conspirator have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan.”

CONCLUSION.

For the reasons hereinabove stated the appellant's complaint herein properly stated a cause of action for damages under the Civil Rights Act against each and all appellees and the order of the District Court dismissing the action and the judgment thereon should be reversed.

Dated, San Francisco, California,
February 10, 1950.

Respectfully submitted,

MARTIN J. JARVIS,

ELMER P. DELANY,

RICHARD O. GRAW,

Attorneys for Appellant.

No. 12,430

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,
vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES, (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON, CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE ELMER E. ROBINSON.

FILED

DEC 17 1950

AUL P. O'BRIEN,

CLERK

McGUIRE & LAHANIER,
W. A. LAHANIER,
2 Pine Street, San Francisco 11, California,
Attorneys for Appellee
Elmer E. Robinson.

Subject Index

	Page
Statement of case	1
Argument and statement of points	2
I.	
The facts allege no actionable wrong by appellee Elmer E. Robinson	4
II.	
The federal court had no jurisdiction of the action.....	8
III.	
Section 43, Title 8, U.S.C., does not apply to appellee Elmer E. Robinson as a private citizen not acting under color of state authority	12
Conclusion	15

Table of Authorities Cited

Cases	Pages
Adamson v. California, 332 U.S. 46	9
Barsky v. United States, 167 F. (2d) 241.....	11
Bottone v. Lindsay, 10 Cir. 170 F. (2d) 705.....	9
Butts v. Merchants Co., 230 U.S. 126, 57 L. ed. 1422.....	12
Civil Rights Cases, 109 U.S. 3, 27 L. ed. 835.....	12
Douglas v. Jeanette, 319 U.S. 157, 87 L. ed. 1324.....	9
Downs v. United States, 3 F. (2d) 855	13
Hardyman v. Collins, 80 F. Supp. 501.....	9, 15
Hodges v. U. S., 203 U.S. 1, 51 L. ed. 65	12
Hurtado v. California, 110 U.S. 516.....	9
Love v. Chandler, 124 F. (2d) 785.....	12
Maxwell v. Dow, 176 U.S. 581	8
McShane v. Moldovan, 172 F. (2d) 1016.....	9
Mitchell v. Greenough, 9 Cir., 100 F. (2d) 184.....	9
Moffett v. Commerce Trust Co., 75 F. Supp. 303.....	6, 14
Powe v. United States, 109 F. (2d) 147.....	12
Rabinowich case, 238 U.S. 78	13
Screwes v. United States, 325 U.S. 91, 89 L. ed. 1495.....	12
Snowden v. Hughes, 321 U.S. 1, 88 L. ed. 497.....	8
Tompsett v. Ohio, 146 F. (2d) 95	8
United States v. Crosby, 1 Hughes 488, Fed. Case No. 14,893	8
United States v. Cruickshank, 92 U.S. 542, 23 L. ed. 588...	8
United States v. Josephson, 165 F. (2d) 82.....	7, 11
Wheeler v. United States, 254 U.S. 281, 65 L. ed. 270.....	12

Codes and Statutes**Pages**

California Government Code, Section 9412	3
Title 8, U.S.C., Section 43	2, 5, 6, 8, 9, 10, 11, 12, 14, 15
Title 8, U.S.C., Section 47	2, 5, 6, 8, 9, 11, 14, 15
United States Constitution :	
14th Amendment	8, 9, 12, 13, 14, 15
15th Amendment	8, 9, 14

Texts

15 Corpus Juris Secundum, Conspiracy, Section 21	6
--	---

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES, (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON, CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE ELMER E. ROBINSON.

STATEMENT OF CASE.

Appellant filed this action against the members of the Un-American Activities Committee of the California State Senate and Elmer E. Robinson, as a private citizen, claiming damages for an interference with his freedom of speech or his right to petition the

California Legislature. Appellant bases the jurisdiction of this Court on Sections 43 and 47 of Title 8 U.S.C., which he quotes in his opening brief.

The complaint, with its exhibits, stripped of arguments and conclusions, alleges:

That on January 28, 1949, appellant was circulating an unsworn petition among the California State Legislators which accused the Tenney Un-American Activities Committee of using him as an instrument to smear Franck R. Havenner as a candidate for mayor in 1946, implicating Elmer E. Robinson, Mayor of San Francisco, and asserting that no further appropriations should be made to the Committee for their work. (Tr. pp. 4 and 5.) From the exhibits attached to the complaint, it appears that this petition stated facts contrary to a sworn affidavit made in San Francisco previously by appellant (Tr. pp. 23 and 24, Exh. D, and Tr. pp. 42 and 43), and contrary to his sworn testimony given in Oakland before the Tenney Committee on a previous occasion. (Tr. p. 25, Exh. E.) The complaint further alleges: that Tenney telegraphed the District Attorneys of San Francisco and Alameda, requesting perjury action against appellant because of the statements' variance with his sworn testimony (Tr. p. 6); that appellee Tenney advised Elmer E. Robinson by telephone of the charges in the petition; that it was agreed to hold a Committee meeting and that Elmer E. Robinson would appear as a witness (Tr. p. 5); that a subpoena was served on appellant to appear before the Tenney Committee on January 29, 1949 (Tr. p. 5), (the Legislature had

recessed on January 29, 1949 at 3:00 o'clock P.M.); that appellant and his counsel appeared, as did Elmer E. Robinson; that Elmer E. Robinson made a statement and then testified under oath concerning the matters charged in appellant's petition (Tr. p. 7); that appellant was sworn, but refused to testify, and was charged with a misdemeanor under Section 9412 of the California Government Code for refusing to testify (Tr. p. 8); that he was tried and, after a disagreement (11 to 1 for acquittal) the complaint was dismissed. (Tr. p. 9.)

Aside from the foregoing, the complaint is replete with accusations, conclusions and arguments, which should be disregarded.

The lower Court's action in dismissing the complaint as to appellee Elmer E. Robinson was correct for three reasons:

1. The complaint fails to allege any facts showing that appellee Elmer E. Robinson committed any wrongful act.

2. The Federal Court had no jurisdiction of the action.

3. In any event, appellee Elmer E. Robinson, as a private citizen not acting under color of State authority, is not subject to suit under the statutes cited.

I.

**THE FACTS ALLEGE NO ACTIONABLE WRONG BY
APPELLEE ELMER E. ROBINSON.**

Aside from the legal obstacles to appellant's position, it is elementary that the complaint must allege the commission of some wrongful act or acts by appellee, Elmer E. Robinson, and damage to the appellant.

Appellant's theory seems to be that Elmer E. Robinson conspired with appellee Tenney to appellant's damage, because he received a telephone call from appellee Tenney advising him of the charges in appellant's petition and he and Tenney discussed the matter and it was agreed to have a Committee hearing of the Tenney Committee, where appellee Elmer E. Robinson would appear. It is not alleged nor contended that appellee Elmer E. Robinson could call a meeting of the Committee. Hence, the net result of the appellant's allegations in this regard is that Elmer E. Robinson agreed to appear before the Committee to testify as to the charges made against himself and the Committee. In sum, this is all that is charged against appellee, Elmer E. Robinson, other than the fact that he appeared, made an unsworn statement and testified.

Appellant's objection is that because appellee Elmer E. Robinson exercised his right of free speech, appellant was injured by Robinson's denial, under oath, of appellant's unsworn charges, which appear to be contrary to appellant's previous sworn testimony. Such a position is inconsistent, to say the least, but

is no more inconsistent than the many other well-known attacks on the Un-American Activities Committee of the various States and Congress.

Who is the appellant Brandhove? We are, of course, limited to the record on appeal. However, a careful examination of this record discloses that the appellant, who is careless with the facts, now demands damages because somehow, not clearly shown, his right to petition the California Legislature was impaired. (From the record attached to his complaint, it is clear that appellant appeared before the Tenney Committee on November 4, 1947, and there testified on a number of matters (Tr. p. 43), and at that hearing Mr. Gladstein presented an affidavit of Brandhove to the effect that previous testimony given by him was false and Brandhove testified he had been offered \$5,000.00 to make the affidavit. (Tr. p. 43 and Tr. pp. 68 and 69.)

From a purely factual standpoint, appellee, Elmer E. Robinson contends that appellant has failed to allege facts showing any interference with (a) his right of free speech, or (b) his right to petition the California Legislature. Appellant has failed to sustain the burden of showing how anything done by Elmer E. Robinson was wrongful or damaging to him, and hence, it is submitted that the complaint was properly dismissed as to appellee Elmer E. Robinson on the ground that no facts are alleged that competently charge him with a wrongful act. In a civil action for damages under Sections 43 and 47 of Title 8 U.S.C., the action is based on the wrong or wrongs perpetrated by the defendant or defendants. There is no

cause of action for a civil conspiracy as such. This question was thoroughly discussed in *Moffett v. Commerce Trust Co.*, 75 F. Supp. 303. In this case, the plaintiff sued several persons for damages resulting from a conspiracy which deprived her of due process of law and equal protection of the law. She based her action on Sections 43 and 47 of Title 8 U.S.C. The action was dismissed and the Court said:

“This being an action for a civil wrong wrought under an alleged conspiracy, it must not be forgotten that the gist or gravamen of the action is not the conspiracy itself but the civil wrong done under the conspiracy and which wrong or wrongs resulted in damage to plaintiff.”

and,

“It is the rule, therefore, that each tortious act resulting in damage creates an independent, separate and distinct cause of action against the conspirators.”

“An inspection of plaintiff’s amended complaint shows that it contains many alleged tortious acts. These are not separated but are incorporated in one complaint as if there was a single cause of action, and, at the conclusion of the complaint covering 83 typewritten pages, plaintiff prays damages as above set out. The complaint partakes of the nature of a Federal indictment in the case of a criminal conspiracy and the alleged tortious acts are treated merely as overt acts. This, of course, cannot be done under the Federal Rules of Civil Procedure. 28 U.S.C.A. following Section 723 C.”

See also Vol. 15, *Corpus Juris Secundum*, Conspiracy, Section 21.

From a careful reading of appellant's complaint in our case, we must conclude that he fails to allege a single wrongful act committed by appellee Elmer E. Robinson, and further fails to allege how any act of said appellee caused him or his property any damage.

In *U. S. v. Josephson*, 165 F. (2d) 82, the Court, in affirming the conviction of defendant for refusing to testify before the Congressional Un-American Activities Committee said:

"Thus, the only real basis for the appellant's contention seems to be that in some way the First Amendment in protecting freedom of speech guarantees such privacy in speaking as the particular speaker may desire, and that this privacy is violated by whatever disclosure occurs incidental to an investigation for legislative purposes. This is a fallacy essentially based upon the idea that the Constitution protests timidity."

Paraphrasing the foregoing quotation, we may say that appellant contends that the 14th Amendment somehow protects him and his utterances from criticism and enjoins silence on those he selects for his criticism, and no one should be permitted to answer his accusations.

Therefore, it is submitted that on a purely factual basis, the complaint was properly dismissed for failing to allege the commission of any wrongful acts by appellee Elmer E. Robinson, or for that matter by any appellee.

II.

THE FEDERAL COURT HAD NO JURISDICTION
OF THE ACTION.

In discussing the legal obstacles to appellant's action in the Federal Court, we must, like appellant, assume that his freedom of speech and right to petition the California Legislature was interfered with or obstructed.

Appellant bases jurisdiction on Sections 43 and 47 of Title 8 U.S.C. These statutes were adopted as enabling acts to the 14th and 15th Amendments to the United States Constitution, and hence, the scope of their application is limited by the scope of the amendments.

United States v. Cruikshank, 92 U.S. 542, 23 L. ed. 588.

In the first place, it seems clear that the right to petition the California Legislature is not a right protected by the 14th and 15th Amendments. In *Snowden v. Hughes*, 321 U.S. 1, 88 L. ed. 497, it was held that right to be a candidate to a State office is not protected by the 14th Amendment.

Other rights not protected by the 14th Amendment from State action are:

Right to trial by jury in a State Court. *Tompsett v. Ohio*, 146 Fed. (2d) 95.

Freedom from unreasonable searches and seizures. *United States v. Crosby*, 1 Hughes 448, Fed. case No. 14,893.

Right to indictment by Grand Jury. *Maxwell v. Dow*, 176 U.S. 581.

Prohibition against self-incrimination. *Adamson v. California*, 332 U.S. 46.

Right to be charged by indictment in felony cases. *Hurtado v. California*, 110 U.S. 516.

In *Hardyman v. Collins*, 80 F. Supp. 501, we find an excellent discussion of the difference between rights protected by the 14th Amendment and those that are personal and come under solely State jurisdiction.

Thus, if any right protected by the 14th and 15th Amendments was violated, it was appellant's right to freedom of speech. This right is protected from State action by the "due process" clause of the 14th Amendment. *Douglas v. Jeannette*, 319 U.S. 157, 87 L. ed. 1324.

The law is clear that Section 43 of Title 8 U.S.C. applies to protection against violation of due process of law, and Section 47 of Title 8 U.S.C. (*conspiracy section*) applies only to denial of equal protection of the laws. In a case footnote to *McShane v. Moldovan*, 172 F. (2d) 1016, the Court said:

"Sections 43 and 47 grant separate and distinct rights of action. Section 43 gives a cause of action for denial of due process of law; and Section 47, for denial of equal protection of the laws. See *Mitchell v. Greenough*, 9 Cir., 100 F. (2d) 184; *Bottone v. Lindsay*, 10 Cir., 170 F. (2d) 705."

In *Mitchell v. Greenough*, 100 F. (2d) 184, this distinction is discussed. The action under civil rights statutes for damages for conspiracy to deprive plaintiff of right to practice law through a conviction by use of perjured testimony. Section 47 was the basis

of plaintiff's complaint, and was held not applicable because it related to equal protection of the laws, which is not the same as due process of law.

“The prohibition against denial of the equal protection of the law was to prevent class legislation or action.”

“The question then is whether or not a conspiracy to secure a conviction of a criminal offense in a Court having jurisdiction thereof and of the defendant knowingly using perjured testimony to convict an innocent person, is a conspiracy for the purpose of impeding the due course of justice in an attempt to deny to any citizen the equal protection of the laws. It is only in case of a conspiracy to effectuate such a purpose that one damaged in his person or property, or deprived of his rights as a citizen of the United States, is entitled to maintain an action for damages in the Federal Courts under the Statute.”

“No such purpose was involved in the alleged conspiracy in the case at bar. Appellant was subjected to no greater hazard of being prosecuted for a crime and convicted by false testimony
* * *.”

Thus, if appellant in our case has a cause of action, it must be based on Section 43 of Title 8 U.S.C., which states:

“Every person who, under color of any Statute, Ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

Section 47 does not apply, hence the allegations of conspiracy must be disregarded as surplusage and the acts of each individual appellee must be examined to determine if any one of them committed an act damaging appellant as defined in Section 43 Title 8 U.S.C.

It is submitted that everything that any appellee did was lawful and did not interfere with appellant's freedom of speech.

The Courts will not inquire into the propriety of the resolution creating the State Un-American Activities Committee and will accept the declaration in the creating resolution that the information is sought for legislative purpose. *United States v. Josephson*, 165 F. (2d) 82; *Barsky v. United States*, 167 F. (2d) 241. Hence, everything done by the Committee was lawful and proper and while it may have inconvenienced appellant to appear, so would it inconvenience any citizen to appear before the Committee to testify, or so it does inconvenience every witness called to testify in Court.

This phase of the case is more completely covered by the brief of the other appellees and this appellee ent concurs in their position. Obviously, if no cause of action is stated as to the members of the Committee, then none is stated as to appellee, Elmer E. Robinson.

Wherefore, it is submitted that the complaint was properly dismissed on the ground that it failed to state a cause of action of which the Federal Court had jurisdiction.

III.

SECTION 43, TITLE 8, U.S.C., DOES NOT APPLY TO APPELLEE ELMER E. ROBINSON, AS A PRIVATE CITIZEN NOT ACTING UNDER COLOR OF STATE AUTHORITY.

But as to appellee, Elmer E. Robinson, we must go one step further. By an unbroken line of cases, the Supreme Court has consistently held that, with the exception of purely Federal rights (right to vote in Congressional election, etc.), the power of Congress to pass enabling legislation under the 14th Amendment is limited to limitations upon State action and State officials or agents acting under color of State authority.

Civil Rights cases, 109 U.S. 3; 27 L. ed. 835;
Hodges v. United States, 203 U.S. 1; 51 L. ed.
65;

Butts v. Merchants Co., 230 U.S. 126; 57 L. ed.
1422;

Wheeler v. United States, 254 U.S. 281; 65 L.
ed. 270;

Screws v. United States, 325 U.S. 91; 89 L.
ed. 1495;

Powe v. United States, 109 F. (2d) 147;

Love v. Chandler, 124 F. (2d) 785.

Thus, appellee, Elmer E. Robinson, as an individual, could not be civilly sued under a Congressional Act for violating any non-Federal civil rights protected by the 14th Amendment, such as freedom of speech. Appellant attempts to avoid this problem by asserting that a person not able to commit a crime himself can be liable for conspiracy with others to commit the crime. He cites several criminal cases. These cases merely hold that "A" may be criminally guilty of conspiring with "B" to commit a criminal act, even though "A" could not commit the act himself. For example, in the *Downs* case, 3 Fed. (2d) 855, it was held that officers of the law could be convicted of conspiring with two other persons to bribe themselves, even though they could not personally be convicted of the substantive crime of offering themselves a bribe. In the *Rabinowitch* case, 238 U.S. 78, six persons were indicted for conspiracy to violate the United States Bankruptcy Act relating to the concealing of property. Three of the persons owned the property; three did not. However, the Court properly held that all six could be convicted of conspiracy to conceal the property.

These cases cited by counsel are criminal cases, and obviously not applicable in the instant case, because in each of the cases cited, a conspiracy to commit a particular crime was a separately recognized offense within itself.

Here, appellant overlooks one thing. In the cases cited, there was jurisdiction and power to define a

crime. In our case, Congress is without Constitutional power to legislate civil liability upon private individuals under the 14th and 15th Amendments. It cannot do indirectly what it cannot do directly, and any construction of a Congressional Act beyond the constitutional power to legislate would be as unconstitutional as the bad legislation itself. Furthermore, civil liability under an alleged conspiracy is different than a criminal conspiracy. In the case of a crime, the conspiracy is punished. In the case of civil conspiracy, the gravamen of the action is the civil wrong done. There is no civil liability for a conspiracy as such. The liability is for the actual wrong committed. *Moffett v. Commerce Trust Co.* (supra).

Thus appellee, Elmer E. Robinson, if liable at all, would be liable for damages resulting from any of his own acts claimed to have interfered with appellant's free speech, and not for the conspiracy. For this reason, appellant cannot avoid the constitutional barrier to the present claim against appellee Elmer E. Robinson as an individual.

Section 43 of Title 8 of U.S.C., cited by appellant, cannot be the basis of an action against appellee, Elmer E. Robinson, because he was admittedly *not* acting under color of State authority. Appellant's only claim of jurisdiction over Elmer E. Robinson is that he is liable under Section 47 (3) Title 8 U.S.C. because he conspired with others who acted under color of State authority. However, it has been held that this section applies to equal protection of the

laws and not to rights arising under the due process provisions of the 14th Amendment. *McShane v. Moldovan*, 172 F. (2d) 1016; *Hardyman v. Collins*, 80 F. Supp. 501.

In our case, there is no allegation or showing that appellant was deprived of equal protection of the laws by Elmer E. Robinson or anyone else. This section cannot be the basis of a claim of damages for interference with freedom of speech. And even in the cases where it applies, it is limited to damages to person or property—none of which are alleged in appellant's complaint.

Section 43 is the only section that could apply, to give a cause of action for interference with freedom of speech. *Hague v. C.I.O.*; *McShane v. Moldovan*, 172 F. (2d) 1016.

Section 47 is limited to matters relating to equal protection of the laws.

Wherefore, it is submitted that the complaint was properly dismissed on the ground that the Federal Court had no jurisdiction in a civil suit for damages against appellee, Elmer E. Robinson, as an individual, not acting under color of authority.

CONCLUSION.

In summary, it is submitted that from a purely factual standpoint, the complaint fails to allege the commission of any wrongful acts by appellee Elmer E.

Robinson or any other appellee, and thus, aside from the legal obstacles to appellant's complaint, the lower Court acted properly in dismissing it as it stated no cause of action.

Dated, San Francisco, California,
April 14, 1950.

Respectfully submitted,

McGUIRE & LAHANIER,

By W. A. LAHANIER,

Attorneys for Appellee

Elmer E. Robinson.

No. 12,430

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,

Appellant,

VS.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON; CLYDE A.
WATSON and ELMER E. ROBINSON,

Appellees.

BRIEF FOR APPELLEES OTHER THAN ELMER E. ROBINSON.

HAROLD C. FAULKNER,

WILBUR F. MATHEWSON,

MELVIN, FAULKNER, SHEEHAN
& WISEMAN,

1101 Balfour Building, San Francisco 4, California,

FRED N. HOWSER,

Attorney General of the State of California,

C. J. SCOTT,

Assistant Attorney General of the State of California,
Library & Courts Building, Sacramento, California,

FRED B. WOOD,

995 Market Street, San Francisco 3, California,

Attorneys for Appellees

other than Elmer E. Robinson.

FILED

APR 18 1950

AUL P. O'BRIEN,

CLERK

Subject Index

	Page
Statement of basis of original and appellate jurisdiction....	1
Statement of the case	2
Argument	10

Part One.

Appellant's complaint does not state a cause of action for damages under the Civil Rights Act	10
I. Summary of complaint	11
II. Facts alleged do not show deprivation of civil rights	15
A. Due process of law	15
B. Freedom of speech	17
C. The privilege of petitioning the legislature for the redress of grievances	17
D. The Requirement to plead specific facts as distinguished from conclusions of law is essential in cases of this type	17
III. The resolution creating the committee is constitutional	18
IV. Motives of the committee not subject to judicial scrutiny	20
A. These claims cannot be sustained factually.....	20
B. These claims likewise cannot be sustained under the law	20

Part Two.

I. The legal arguments of appellant	22
A. Only those acts occurring at the hearing were done under color of law	24
(1) Causing appellant's arrest and imprisonment and compelling him to stand trial on a criminal contempt charge was not under color of state law	24

	Page
(2) Sending state telegrams to various (two) district attorneys urging them to prosecute appellant for perjury for circulating the petition was not done under color of state law.....	27
B. The appellant was not deprived of any rights guaranteed by the Constitution or laws of the United States	28
(1) The appellant was not deprived of due process	28
(a) The hearing was fair and impartial....	28
(b) Compelling appellant's attendance at the hearing without prior disclosure of the purpose thereof was not a deprivation of any constitutional right of appellant....	28
(c) The questions pertained to proper legislative purposes	31
(d) Resolution relating to charging appellant with a misdemeanor.....	32
(e) The threatened expulsion of appellant's counsel from the hearing room was not improper	32
(f) Matters read into the record.....	33
(2) The appellant was not deprived of the right of free speech	33
(3) The appellant was not denied the equal protection of the law	34
II. The resolution of the California State Senate creating the appellees' committee known as the Senate Fact Finding Committee on Un-American Activities is constitutional	35
Conclusion	36

Table of Authorities Cited

Cases	Pages
Battellee, In re, 207 Cal. 227, 244	25, 29
Black, In re, 47 F. (2d) 543.....	16
Blair v. United States, 250 U.S. 273.....	16
Bottone v. Lindsley (1948), 170 F. (2d) 705.....	26
Dennis v. United States, 171 F. (2d) 986	18, 20
Eisler v. United States, 170 F. (2d) 273.....	21, 31
Jones v. Securities & Exchange Commission, 298 U.S. 1, 26	30
McCarthy, Ex parte, 29 Cal. 395, 402	31, 32
McGrain v. Daugherty, 273 U.S. 135	21, 29
Mitchell v. Greenough, 100 F. (2d) 184.....	34
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186	30
People v. Tibbits, 71 Cal. App. 709, 711	26
Picking v. Pennsylvania R. Co., 151 F. (2d) 240.....	13
Snowden v. Hughes, 321 U.S. 1	34
Springfield v. Carter, 175 F. (2d) 914, 917	13
United States v. Classic, 313 U.S. 299	26
United States v. Cruikshank, 92 U.S. 542	34
United States v. Josephson, 165 F. (2d) 82.....	21, 33
United States v. Morton Salt Co., 70 S. Ct. 357	30
Vern Smith v. People of the State of Cal., 69 S. Ct. 893..	19
Williams v. Miller, 48 F. Supp. 277, 317 U.S. 599.....	17

Codes and Statutes

Constitution of the State of California, Article IV, Section 2	12
Constitution of the United States, 14th Amendment	18, 35

	Pages
Government Code of the State of California:	
Section 9402	16
Section 9407	25
Section 9408	25
Section 9410	5
Section 9412	5, 13, 24, 25
Rev. Stats.:	
Section 1979	2
Section 1980	2
United States Code Annotated:	
Title 8, Section 43	2, 11
Title 8, Section 47(3)	2, 11
Title 28, Section 1291	1
Title 28, Section 1343(1)	2
Title 28, Section 1343(3)	2
Miscellaneous	
State of Cal. Senate Resolution No. 75	19, 32

No. 12,430

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,

Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON; CLYDE A.
WATSON and ELMER E. ROBINSON,

Appellees.

BRIEF FOR APPELLEES OTHER THAN ELMER E. ROBINSON.

**STATEMENT OF BASIS OF ORIGINAL AND
APPELLATE JURISDICTION.**

The present appeal is from a judgment of the District Court of the United States for the Northern District of California, Southern Division, dismissing appellant's complaint for damages as to each and all of the appellees. This Court has jurisdiction by 28 U.S.C.A. Sec. 1291.

The appellant asserts that his complaint was for damages under the Civil Rights Act (Rev. Stat. Sections 1979 and 1980, 42 U.S.C.A. Sections 1983 and 1985) of which the District Court had jurisdiction under 28 U.S.C.A. Section 1343 (1) and (3)). Appellees deny that the complaint stated a claim for relief under the Civil Rights Act.

STATEMENT OF THE CASE.

On March 21, 1949, appellant filed in the United States District Court for the Northern District of California, Southern Division, a complaint for damages against the appellees. Appellant's "Statement of the Case" is a paraphrased summary, essentially accurate, of a *portion* of his complaint.

The complaint, however, contains more. Paragraph 8 thereof makes the record of the hearing before the Senate Fact-Finding Committee on Un-American Activities, hereinafter referred to as the "Committee", an exhibit, and by reference it is made a part thereof (Exhibit F, T.R. 26-75). The complaint makes the subpoena served upon appellant a part of his complaint. See Complaint, Paragraph 3 (T.R. p. 5). The subpoena appears in the transcript on page 22. Thus, the complaint in its entirety alleges that a subpoena was served upon appellant on January 28, 1949, and pursuant thereto he appeared before the Committee in an open meeting at the State of California Capitol Building on Saturday, January 29, 1949, at which time

the Committee members were present; the Attorney General's office of the State of California was present, represented by J. Francis O'Shea, Assistant Attorney General of the State of California; Angus Morrison, Esq., Assistant Legislative Counsel of the California State Legislature was present; other attaches of the Committee were present; and Martin A. Jarvis, Esq. was present, appearing on behalf of appellant.

Proceedings were thereupon had, and the chairman of the Committee called the appellant to the stand as a witness. He was thereupon sworn and gave his name and address and occupation. He was asked this question:

“Where did you reside in 1946, in December?”

Thereupon, appellant declared he was represented by Mr. Martin Jarvis of San Francisco. He was asked the question of whether he wished to confer with Mr. Jarvis. Thereupon, Mr. Jarvis, before any further questions were asked of the witness, engaged in a discussion with the chairman of the Committee, in the course of which he presented to and made a part of the record a sworn copy of the statement (Protest to the Legislature) which is part of the complaint of appellant, marked “Exhibit B”, and which appears in the transcript on pages 18 to 22, and then stated the objections of William P. Brandhove to answering questions before the Committee at the hearing. The objections all appear in the transcript, pages 30, 31 and 32. The objections, all made before the hearing developed, were, briefly, that the purpose of the ques-

tions had not been disclosed to Mr. Brandhove; that questions on the subject of the protest against the Senate Un-American Activities Committee were not for a legislative purpose and were in excess of the jurisdiction of the Committee; that the Committee cannot act as judge and accused (accuser). The objections are coupled with charges and demands made upon the Committee by the counsel for Mr. Brandhove, all of which appear in the transcript. The objections were overruled by the chairman. Mr. Jarvis thereupon instructed the witness not to answer any further questions on the grounds stated by him. The chairman overruled the objections again and stated that the witness would be directed to answer the questions. Thereupon the pending question was repeated:

“Mr. Brandhove, where were you residing in December, 1949?” (sic, 1946).

The witness refused to answer on advice of counsel. The witness was thereupon asked this question and gave this reply:

“Q. Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?

A. On advice of Counsel, I will not, no, sir.”

The chairman asked what was the feeling of the Committee, and Senator Dilworth indicated that he felt that the witness was in contempt and that the proper method of dealing with the matter was in the Courts. The Attorney General's office was asked for advice. Discussion was had between the Committee

and the representative of the Attorney General's office and Mr. Morrison, Assistant Legislative Counsel for the State of California. Sections 9410 and 9412 of the Government Code of the State of California were read into the record. Further discussion was had and thereupon the following questions were asked and the following answers given:

“Q. Were you employed by the United States Army Transport Service as Chief Steward at any time?

A. I refuse to answer on advice of counsel.

Q. Were you living at 1831 Twenty-first Avenue in the City of San Francisco in December of 1946?

A. I refuse to answer upon the advice of counsel.

Q. Your objections here, Mr. Brandhove, are based on the grounds your counsel has propounded to the Committee?

A. Yes, sir.

Q. And that is going to be the grounds, on which you object to answering every question?

A. I refuse to answer on advice of counsel.”

Continued discussion occurred between counsel for Brandhove and the Committee. Thereupon the following proceedings occurred:

“Q. Do you now and will you continue to refuse to answer each and every question which may be asked of you at this hearing on those grounds?

A. I refuse to answer any and all questions on advice of counsel.

Q. Do you know Mr. Frank McCormick?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Harry Bridges?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Louis Goldblat?

A. I refuse to answer on advice of counsel.

Q. Do you know David Jenkins?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with John Wiley?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Oleta O'Connor Yates?

A. I refuse to answer on advice of counsel.

Q. Do you know Paul Schnur?

A. I refuse to answer on advice of counsel.

Q. Do you know Sestolv Ward?

A. I refuse to answer on advice of counsel.

Q. Do you know Dick Linden?

A. I refuse to answer on advice of counsel.

Q. Do you know David Hedley?

A. I refuse to answer on advice of counsel.

Q. Do you know Revels Clayton?

A. I refuse to answer on advice of counsel.

Q. Do you know Mr. Mervyn Rathborne?

A. I refuse to answer on advice of counsel.

Q. Do you know Mr. Walter Stack?

A. I refuse to answer on advice of counsel.

Q. Do you know Blacky Quadros?

A. I refuse to answer on advice of counsel.

Q. Do you know Molly K. Spolmack?

A. I refuse to answer on advice of counsel.

Q. Do you know Elaine Sexton?

A. I refuse to answer on advice of counsel.

Q. Do you know Mary Lake?

A. I refuse to answer on advice of counsel.

Q. Do you know Mr. R. E. Combs?

A. I refuse to answer on advice of counsel.

Q. Do you know Hugh Bryson?

A. I refuse to answer on advice of counsel.

Q. Do you know Nathan Jacobsen?

A. I refuse to answer on advice of counsel.

Q. Do you know Irving Dvorin?

A. I refuse to answer on advice of counsel.

Q. Do you know Scotty Sneddon?

A. I refuse to answer on advice of counsel.

Q. Do you know Joseph Harris?

A. I refuse to answer on advice of counsel.

Q. Do you know James Kiernan?

A. I refuse to answer on advice of counsel.

Q. Do you know Frank Havenner?

A. I refuse to answer on advice of counsel.

Q. Calling your attention to February of 1945, did you discuss affiliation with the Communist Party with anyone?

A. I refuse to answer on advice of counsel.

Q. In February of 1945, did two men by the name of McCormick and Bryson agree to recommend you to membership in the Communist Party?

A. I refuse to answer on advice of counsel.

Q. Were you invited to a dinner by Frank McCormick at the home of Henry Fisher in San Francisco?

A. I refuse to answer on advice of counsel.

Q. Did you attend a dinner in San Francisco on or about February 1945 at which time was present Richard Gladstein, Walter Stack, Mrs. Stack and Mrs. Gladstein and Frank McCormick?

A. I refuse to answer on advice of counsel.

Q. Have you ever been, Mr. Brandhove, a member of the Communist Party?

A. I refuse to answer on advice of counsel.

Q. Are you now a member of the Communist Party, Mr. Brandhove?

A. I refuse to answer on advice of counsel.

Mr. Jarvis. Mr. Chairman, we have some more signed copies of the objections.

Chairman Tenney. We would be glad to have them.

Q. Referring to the affidavit that your counsel has presented to the Committee, is that your signature, William Patrick Brandhove?

A. I refuse to answer on advice of counsel.

Mr. Jarvis. In that regard, Mr. Chairman, the signature is before a Notary and the fact that the Notary is a Notary is a matter for judicial recognition.

Chairman Tenney. Is that your signature, William P. Brandhove?

Q. Did you take this affidavit before a Notary and have it notarized?

A. Yes, I did.

Q. And that was on the twenty-ninth of January, 1949?

A. This morning.

Q. Did you sign the affidavit in the presence of the Notary?

A. Yes, I did, in his office.

Q. That is Mr. R. M. Stillane?

A. Yes, sir.

Q. Are you acquainted with Assemblyman George Collins?

A. I refuse to answer on advice of counsel.

Q. Were you a guest of Mr. Collins in the Assembly yesterday?

A. I refuse to answer on advice of counsel.

Q. Were you with Mr. Collins in the Assembly today?

A. I refuse to answer on advice of counsel.

Q. Are you a friend of William Snyderland, the secretary of the Communist Party in California?

A. I refuse to answer on advice of counsel."

Thereupon a motion was carried unanimously to the effect that the Committee hold the witness in contempt and that counsel be instructed to prepare the necessary complaint and have it filed against him in the proper Court in Sacramento.

Two other questions were asked of appellant and the following answers given:

"Q. Are you acquainted with Congressman Franck Havenner's secretary?

A. I refuse to answer on the advice of counsel.

Q. On the grounds heretofore mentioned?

A. That is correct.

Q. One other question, Mr. Brandhove. Does the Army Transport Service in San Francisco have a record of your activities?

A. I refuse to answer on the advice of counsel.
Chairman Tenney. Very well; that is all."

Prior to the latter questions the Committee's attention was called to the fact that the appellant had made an affidavit on December 9, 1946, which appeared in the Committee's 1947 report, in which affidavit the appellant "admits being a former member of the Communist Party and specifically that he was induced to become a member of the Communist

Party by Frank McCormick and Hugh Brysen in San Francisco; that after joining the Communist Party he carried out communist activities and so forth."

Other matters are contained in the record made a part of appellant's complaint. The exact or the substance of all questions asked of appellant are above set forth for the benefit of the Court.

The Committee proceeded with its meeting, and other matters relating to the prior activities of Brandhove, the statements made on oath by him to the Committee, and affidavits made on oath by him to the Committee were referred to. Elmer E. Robinson, appellee, made a statement and also gave testimony before the Committee. All of these matters appear on pages 45 to 74 of the transcript.

ARGUMENT.

PART ONE.

APPELLANT'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR DAMAGES UNDER THE CIVIL RIGHTS ACT.

The statutes involved are set out on pages 2 and 3 of the opening brief for appellant. Of necessity the facts upon which appellant relies must state a cause of action under the statutes quoted. Testing the complaint as filed or stripping from it all surplusage and legal conclusions, it fails to disclose:

(a) That the appellees, under color of any statute, ordinance, regulation, custom or usage of any state,

subjected or caused to be subjected the appellant to the deprivation of any right, privilege or immunity secured by the Constitution and laws. (Title 8 U.S.C., Section 43).

(b) That appellees conspired for the purpose of depriving, either directly or indirectly, appellant of the equal protection of the laws or of equal privileges and immunities under the laws or for the purpose of preventing or hindering constituted authorities of California from giving or securing to appellant within such State the equal protection of the laws.

(c) That appellees or any of them did or caused to be done any act in furtherance of any conspiracy whereby appellant was injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States (Title 8 U.S.C. 47(3)).

I.

SUMMARY OF COMPLAINT.

Taking plaintiff's lengthy complaint by the four corners and reducing its substance to an understandable form, we find that Brandhove, a citizen of the United States, had testified before the Committee and had also furnished said Committee with affidavits prior to the time that he circulated in the halls of the State Capitol his so-called protest against a renewed appropriation of funds for the Committee. Contained in the protest were allegations impugning the integrity of the Committee and smearing Elmer E.

Robinson, who was then and is now the Mayor of San Francisco. The protest was being circulated while the Legislature of the State of California was in session, January 28, 1949.

The Court can take judicial notice that the Constitution of the State of California, Article 4, Section 2, provides, among other things, that

“All general sessions shall commence at 12 o'clock m., on the first Monday after the first day of January and shall continue for a period not exceeding 30 days thereafter; whereupon a recess of both Houses must be taken for not less than 30 days.”

The following concurrent resolution was adopted:

SENATE CONCURRENT RESOLUTION No. 26

CHAPTER 76

Senate Concurrent Resolution No. 26—Relative to adjournment of the Legislature for the constitutional recess, and to the reassembling of the Legislature after said recess, and fixing the date for said adjournment and said reassembling.

[Filed with Secretary of State February 3, 1949.]

WHEREAS, Section 2 of Article IV of the Constitution of this State requires that, after the Legislature has been in session for a period of not exceeding thirty days a recess must be taken by both houses for a period of not less than thirty days, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the

1949 Regular Session of the Legislature of the State of California shall adjourn for said recess at 3 o'clock p.m. on the twenty-ninth day of January, 1949, and shall reassemble at 12 o'clock m. on March 7, 1949.

The Court may take judicial notice of above! *Springfield v. Carter*, 175 F. (2d) 914 at 917; *Picking v. Penn. Ry. Co.*, 151 F. (2d) 240.

On January 28, 1949, a subpoena was issued and served on appellant (T.R. p. 22.), requiring him to appear before the Committee at a place therein specified, at 3:00 P.M. on Saturday, the 29th of January, 1949. Appellant appeared at the time and place fixed and was sworn as a witness and testified concerning his name, address and occupation. He was thereupon asked,

“Where did you reside in 1946, in December?”

Appellant refused to answer this and the other questions which are set out in the statement of the case, *supra*. The grounds for appellant's refusal were stated by his counsel and were partially repeated by the appellant. Upon refusal of appellant to answer the last question propounded to him, the hearing was concluded as to appellant (T.R. p. 45).

The Committee resolved to refer the matter of appellant's conduct to the Court and there was filed a complaint in the proper Court, charging appellant with the misdemeanor of violating Section 9412 of the Government Code of California. This section provides in part:

“Every person who, being summoned to attend as witness before the Senate, Assembly, or any committee, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before the Senate, Assembly or any committee, wilfully refuses to be sworn, to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers, or documents in his possession or under his control is guilty of a misdemeanor.”

The complaint was filed on January 31, 1949, in the Municipal Court of the City of Sacramento. Upon the complaint, plaintiff was arrested and imprisoned on the 1st day of February to the 15th day of February, 1949. He was prosecuted by the officer empowered so to do (the District Attorney) in a Court having jurisdiction; he was tried before a jury, which jury disagreed as to his guilt. The cause was continued to March 9, 1949, on which date, on motion of the prosecuting attorney, the charge was dismissed and the plaintiff discharged.

On March 21, 1949, the present complaint was filed. The complaint fails to show any further contact between the appellees and the appellant subsequent to January 29, 1949; nor does the complaint disclose that at any time subsequent to March 7, 1949, the date of the resumption of the session of the Legislature, any effort was made by appellant to continue to circulate his protest.

It appears further that on January 28, 1949, two of the appellees sent a telegram to the District At-

torneys of the City and County of San Francisco and the County of Alameda, signed by them as chairman and vice-chairman of the Committee, urging each of said District Attorneys to charge Brandhove with perjury or have the entire matter presented to the respective grand juries of each county.

There are further allegations in the complaint concerning the reading into the record of a claimed false criminal record of plaintiff and a newspaper article wherein an affidavit of plaintiff was called a tissue of lies and permitting in the record the statement of the chief counsel of the Committee to its chairman that "Mr. Brandhove was a liar"; also, allegations relating to an examination of appellant's counsel at the hearing before the Committee.

Withholding for future treatment in this brief the position taken by appellant on the appeal, it is apparent that:

II.

FACTS ALLEGED DO NOT SHOW DEPRIVATION OF CIVIL RIGHTS.

When ordinary and existing rules for the construction of pleadings are applied, plaintiff fails completely to allege any fact or circumstance showing deprivation of any right, privilege or immunity under the Constitution of the United States, including the XIV Amendment.

A. Due process of law.

No fact is alleged indicating in the slightest degree the deprivation of due process of law. In reading the

complaint, it appears that some claim is made that a right of the defendant was invaded by reason of having been served with a subpoena, which is made a part of the complaint.

In connection with the issuance of subpoenas by committees of the Senate or Assembly, the form thereof is prescribed by Section 9402 of the Government Code of California, which reads as follows:

“A subpoena is sufficient if it:

(a) States whether the proceeding is before the Senate, Assembly, or a committee.

(b) Is addressed to the witness.

(c) Requires the attendance of the witness at a time and place certain.

(d) Is signed by the President of the Senate, Speaker of the Assembly, or chairman of the committee before whom attendance of the witness is desired.”

Every requirement of this section is complied with.

It must be borne in mind that the Legislature is and has been held to be “* * * the grand inquest of the Commonwealth.” *Ex parte McCarthy*, 29 Cal. 395, 402. A witness subpoenaed before a legislative committee is analogous to a witness subpoenaed before a grand jury. Applying the analogy, we find plaintiff's claim has consistently been decided adversely to his contention. See *In re Black*, 47 F. (2d) 543; also, *Blair v. United States*, 250 U.S. 273 (Plaintiff cited no authorities in support of his position).

B. Freedom of speech.

The complaint is completely silent on any facts or circumstances which in the slightest degree indicated that he was deprived of freedom of speech. As a matter of fact, when he had the opportunity to speak, he spoke the things he wanted to say, then remained silent and refused to answer any questions.

C. The privilege of petitioning the Legislature for the redress of grievances.

Although a claim is made in this respect by appellant and appears to be the main point relied upon, there are neither facts nor circumstances alleged in the complaint which indicate in the slightest degree the deprivation of this right by the act of any defendant in the case at bar or by anyone else. The service of a subpoena upon him could not have this effect; the short time that he spent in the hearing before the Committee could not have this effect; his remaining in jail and trial during the recess of the Legislature could not have this effect. Nothing was done to prevent any activity when the Legislature resumed its session on March 7, 1949, until the filing of the complaint.

D. The requirement to plead specific facts as distinguished from conclusions of law is essential in cases of this type.

See opinion of Judge Wilbur in *Williams v. Miller*, 48 F. Supp. 277. In denying certiorari in this case, the Supreme Court of the United States held in accordance with the opinion of Judge Wilbur. See 317 U.S. 599.

III.

**THE RESOLUTION CREATING THE COMMITTEE
IS CONSTITUTIONAL.**

One of the bases of plaintiff's complaint is the claim that the resolution creating the Tenney Committee, if read into any criminal statute, is in violation of the 14th Amendment to the Constitution of the United States for want of certainty. See Paragraph 11 of plaintiff's complaint. This same attack has frequently been made upon the act of Congress creating the United States House of Representatives Committee on Un-American Activities. In the case of *Dennis v. United States*, 171 F. (2d) 986 (affirmed by the Supreme Court after certiorari granted on single issue of challenge of government employees called to serve as jurors), the Court disposes of this point as follows:

“Since one of the chief points raised by appellant is a general attack on the constitutionality of the creation of the Committee and of the resolutions, rules and statute authorizing its activities, it may be said at the outset that it is the self-same Committee, operating under the same set of resolutions, rules and statute as has been recently passed on by at least two Courts of Appeals, and in two of the cases by the Supreme Court of the United States in denying petitions for certiorari. See *Josephson v. United States*, 2 Cir., 1947, 165 F. 2d 82, certiorari denied, 1948, 333 U. S. 838, 68 S. Ct. 609, rehearing denied, 1948, 333 U.S. 858, 68 S. Ct. 731; *Barsky v. United States*, 1948, U. S. App. D.C., 167 F. 2d 241, certiorari denied, 68 S. Ct. 1511, 334 U.S. 843; and *Eisler v. United States*, 1948, U.S. App. D.C., 170 F. 2d 273.”

The cases cited above are to the effect that the constitutionality of the authority of the Committee should be upheld, that the creation of the Committee and the matters confided to it for investigation were constitutional and lawful.

However, the question has been set at rest by the recent decision of the Supreme Court in *Vern Smith v. The People of the State of California*. This was a petition for appeal to the Supreme Court of the United States in which the conviction of the appellant was sought to be reversed on the grounds that Senate Resolution No. 75 (the resolution appended to the complaint herein) was unconstitutional. The Supreme Court of the United States in passing upon this petition ruled as follows (69 S. Ct. 893):

“Appeal from the Superior Court in and for the County of Alameda, State of California.

April 25, 1949. Per Curiam: The appeal is dismissed for want of a substantial federal question.”

Further, the Supreme Court of the State of California, upon an attack by this appellant, after his arrest as set forth herein, upon the constitutionality of the resolution creating the “Tenney Committee”, ruled against plaintiff on this subject by denying his application for a writ of habeas corpus (See minutes of Supreme Court February 14, 1949, 33 A.C. 454).

IV.

MOTIVES OF THE COMMITTEE NOT SUBJECT TO JUDICIAL SCRUTINY.

Claims in the form of legal conclusions are made as to the intent of the Committee in subpoenaing appellant and holding the hearing. They appear to be (a) to suppress anyone criticizing the Committee and (b) to prevent plaintiff from petitioning the Legislature.

A. These claims cannot be sustained factually.

In respect to (a) above, no fact is alleged in the complaint from which this inference could be drawn. On the contrary plaintiff alleges that the Committee was under attack by certain members of the State Assembly. See Exhibit "F", top of page 5. The Court can take judicial notice of the fact that all such committees have been under constant attack and abuse by communists and communist inspired outlets. Such committees have likewise been criticized by others unconnected with the communistic movement.

In respect to (b) above, it is already covered in Subdivision C of II above.

B. These claims likewise cannot be sustained under the law.

In the case of *Dennis v. United States*, supra, the Court said:

"* * * it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of

the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution.”

The decision in *United States v. Josephson*, 165 F. (2d) 82, touches upon this subject and is well worth considering by the Court.

In *Eisler v. United States*, 170 F. (2d) 273, at page 278, the Court said:

“* * * During the course of the trial defense counsel sought to introduce evidence to show that the Committee’s real purpose in summoning appellant was ‘to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or ‘Congress’ powers.’ The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees.
* * *”

Although there may be no presumption as to the constitutionality of legislation enacted when civil rights are concerned, the fact still remains that the law is that there is a presumption that the action of the legislative body is legitimate. See cases heretofore cited and *McGrain v. Daugherty*, 273 U.S. 135.

Two things emerge with crystal clearness from plaintiff’s complaint: First, that plaintiff was not interfered with in pursuing any right to petition the Legislature; second, everything that happened to plaintiff subsequently was occasioned by his contemptuous refusal to answer questions propounded by

a legally created Committee of the State Senate of the State of California. Contempt for the lawmaking body of the State of California was in the mind of appellant as evidenced by his protest. Contempt for the State Senate was on his lips when he appeared before the Committee.

PART TWO.

We recognize the Courts give meticulous care to cases involving claimed violation of the civil rights of a citizen, else we would close our brief here. We will go further and discuss

I.

THE LEGAL ARGUMENTS OF APPELLANT.

Appellees, other than Elmer E. Robinson, will hereinafter at times be referred to as the "Committee".

The appellant asserts (appellant's brief, p. 10) that he alleged in his complaint that appellees did certain acts:

1. Sent State telegrams to various (two) district attorneys urging them to prosecute appellant for perjury for circulating a petition;
2. Held an unfair and partial hearing of the Tenney Committee;
3. Compelled appellant's attendance at the hearing without prior disclosure of the purpose thereof;
4. Propounded thereat questions to him and his counsel which were not pertinent to any legislative purpose;

5. Resolved that a criminal complaint be filed in the proper Court at Sacramento, California because of appellant's refusal to answer questions at the hearing;

6. Threatened appellant's counsel with expulsion from the hearing room;

7. Read into the record at said hearing a claimed false criminal record of appellant and a newspaper article calling an affidavit of appellant "a tissue of lies" and an alleged telephonic statement by the Chief Counsel of the Tenney Committee that appellant was "a liar";

8. Caused appellant's arrest and imprisonment and compelled him to stand trial on a criminal contempt charge.

Appellant further asserts (appellant's brief, p. 11) that he alleged in his complaint that in doing these acts the appellees did them under color of state law and intended to and did deprive appellees of these constitutional rights:

1. The right of free speech;

2. The right to petition the Legislature for a redress of his grievances;

3. The right to a fair and impartial hearing in matters concerning his personal life, opportunity to earn a living and his honor (Due Process of Law);

4. The equal protection of the laws.

Appellant's complaint fails to allege which of the asserted acts resulted in the deprivation of which of

the rights, nor does appellant in his brief by argument or otherwise indicate which acts of the appellees deprived the appellant of which of his rights. This does not make our reply difficult, but it does enlarge it.

It would appear that of the eight acts or group of acts of which appellant complains, two of them, the eighth and the first, were not done under color of state law or power and that the other six did not result in the deprivation of any right guaranteed to appellant by the Constitution or laws of the United States.

A. Only those acts occurring at the hearing were done under color of law.

(1) Causing appellant's arrest and imprisonment and compelling him to stand trial on a criminal contempt charge was not under color of state law.

In this respect appellant alleged in his complaint that the Committee resolved that a criminal complaint be filed in the proper court in Sacramento and that such a complaint charging appellant with violating Section 9412 of the Government Code of the State of California was signed and sworn to by Appellee Tenney (T.R. 8).

The State of California conferred upon the Committee the authority to conduct a hearing, subpoena the appellant as a witness and question him when he appeared as a witness.

The Committee had the "authority" (if it be authority) to invoke (not to impose) certain sanctions when appellant appeared before the Committee and refused to testify.

If the legislature were in session, it could report to the Senate and if the Senate chose to entertain a motion, the Senate might call the plaintiff before the bar of the Senate in the nature of an order to show cause why he should not testify (*In re Battelle*, 207 Cal. 227; California Government Code, Section 9407.)

The legislature not being in session (see p. 12, *supra*), the Committee could make application to the Superior Court of Sacramento County and the Court would determine whether or not appellant should answer the questions (California Government Code, Section 9408), or a member of the Committee or anyone present could sign a complaint charging a misdemeanor in a Court of competent jurisdiction (California Government Code, Section 9412). The latter is the course that was followed.

Note that under Section 9407 the "authority" is given to the *Committee only*, to report the contempt to the Senate or Assembly, and that under Section 9408 the authority to petition the Superior Court is again conferred *on the Committee*.

However, Section 9412 is a criminal statute which merely specifies that certain conduct is a *misdemeanor*; it vests no authority in the Committee. The filing of a complaint charging the misdemeanor and the issuance of a warrant and all proceedings followed the usual course of misdemeanor actions in California.

On filing the complaint, the Court having jurisdiction and the district attorney having the power and duty to prosecute took complete charge of the matter

from then on. No claim is made by appellant that he did not receive a fair trial, nor does appellant claim that the Judge or District Attorney are parties to the so-called conspiracy.

To make out a cause of action under the Civil Rights Statutes, state *court* proceedings must have been a complete nullity with a *purpose* to deprive a person of his property without due process of law.

Bottone v. Lindsley (1948), 170 F. (2d) 705.

United States v. Classic, 313 U.S. 299, cited by plaintiff on the point, defines "color of law" as follows:

"Misuse of power, possessed by virtue of state law *and made possible only because the wrongdoer is clothed with the authority of state law*, is action taken 'under color of law' * * *."

Under this definition, had the Committee proceeded under either Section 9407 or 9408, the action would have been "under color of law" since it could be taken only because those taking it were members of the Committee clothed with that authority.

However, as noted above, Section 9412 merely makes specified conduct a misdemeanor.

The preliminary complaint in a criminal proceeding is merely an allegation in writing, signed by a person who knows the facts charging that another has committed a designated offense (*People v. Tibbits*, 71 Cal. App. 709, 711). The allegation may be made by any citizen, and indeed it would appear that any citizen who has knowledge of such facts should, as an obli-

gation of his citizenship, report them to the proper authorities. The allegations made in such a complaint are not made by virtue of *authority of the state* with which the complaining witness is clothed. The swearing to such a complaint is not action taken “under color of state law” as that phrase is defined in the *Classic* case.

(2) Sending state telegrams to various (two) district attorneys urging them to prosecute appellant for perjury for circulating the petition was not done under color of state law.

In this respect, appellant alleged in his complaint that appellees Tenney and Burns on behalf of the committee sent telegrams to the District Attorneys of San Francisco and Alameda Counties demanding that they charge appellant with perjury or take the matter before the Grand Jury (T.R. 6). The telegrams themselves *urged* rather than *demand* such action (T.R. 23-25).

The reasoning applied to signing a complaint charging a misdemeanor has application to sending the telegrams. To call circumstances indicating that a crime has been committed to the attention of the proper authorities is the duty of a citizen and does not flow from any *authority* or *color of authority* under State law. It will be observed that the complaint makes no allegation that the charge was unfounded—nor could it, having in mind that the complaint is verified by appellant.

B. The appellant was not deprived of any rights guaranteed by the Constitution or laws of the United States.

(1) The appellant was not deprived of due process.

(a) The hearing was fair and impartial.

Appellant does not indicate in what manner the hearing was unfair and partial except insofar as it may be assumed that the other asserted actions with respect to the conduct of the hearing would necessarily result in an unfair and partial hearing as a matter of law. Each will be considered in turn.

The record of the hearing made part of the complaint (T.R. 28-75) demonstrates factually the complete fairness and impartiality of the hearing. The questions asked appellant were all within the scope of and relative to the Committee's purposes.

(b) Compelling appellant's attendance at the hearing without prior disclosure of the purpose thereof was not a deprivation of any constitutional right of appellant.

In this respect, the appellant alleged in his complaint that the subpoena served upon him ordered him to appear as a witness before the Senate Committee on Un-American Activities (T.R. 5, 22).

The appellant does not question the authority of the Committee to subpoena him, but insists that failure to notify him of the specific purpose of the hearing deprived him of his rights. The Senate resolution authorizing the Committee bestowed upon it the power to subpoena witnesses and there was no requirement, either in the resolution or other law of the State of California relating to investigating committees of the

Legislature, requiring that a witness when subpoenaed be notified of the specific purpose of the hearing or of his testimony.

It would appear from appellant's authorities that in this connection appellant's real objection was not that he was subpoenaed without disclosing the purpose of the hearing, but that he was interrogated at the hearing without being informed of the purpose of the inquiry.

A legislative committee hearing is not an adversary proceeding; the only thing it can affect is the proposal, passage or defeat of legislation. Even plaintiff's complaint (paragraph 7; T.R. pp. 6, 7) alleges that the *ultimate* purpose was to secure legislative action on an appropriation.

In conducting such hearings the Legislature is not to be restricted by the fact that methods and processes generally employed in judicial or quasi-judicial proceedings are used. (*In re Battelle*, 207 Cal. 227, 244; *McGrain v. Daugherty*, 273 U.S. 135).

Certainly plaintiff, in his capacity as a citizen of the United States, has no right to have a State legislative inquiry follow certain forms. That is not a "privilege or immunity" of federal citizenship. Nor from the facts pleaded did the *hearing* deprive plaintiff of life, liberty or property. Finally, there is no allegation of fact to show that other hearings were conducted in another manner or that other contumacious witnesses received better treatment.

Appellant cites *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 26, with some assurance on this point.

We could here enter upon a discussion pointing out the intricacies of the facts in the *Jones* case and the distinction between judicial hearings, administrative hearings and inquisitorial hearings of State Legislatures or other inquisitorial bodies (see *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186; *U.S. v. Morton Salt Co.*, 70 S. Ct. 357, at 362), but to what purpose, for wherein does the principle laid down in the *Jones* case have application to the case at bar? The appellant was properly subpoenaed and was properly before the Committee. He refused to answer questions before they were asked. He was specifically asked this question:

“Q. Do you now and will you continue to refuse to answer each and every question which may be asked of you at this hearing on those grounds?

A. I refuse to answer any and all questions on advice of counsel.”

(T.R. p. 38.)

Up to this point, where was any constitutional right or privilege or immunity of the appellant violated?

Thereupon, under an existing statute, which had general application, the machinery was set in motion by which the appellant was brought to the bar to answer a charge of whether he was guilty of a misdemeanor in respect to his conduct. No constitutional right, privilege or immunity of the appellant was vio-

lated in connection with these proceedings. The Supreme Court of the State of California refused to release him on his application for a writ of habeas corpus. Every right, privilege, immunity and guarantee to a citizen was accorded the appellant from the beginning of the controversy to the end thereof. His legal position, whether good or bad, asserted at the hearing before the Committee was available to him when the complaint charging the misdemeanor was filed. A jury disagreed as to his guilt, and a prosecuting officer ultimately dismissed the case. All the Committee did was to invoke the constituted judicial processes of the State of California to determine the propriety of the action of appellant in refusing to answer the questions. Carrying appellant's position to the conclusion which he desires to be reached would result in an absurdity. To illustrate: In any State case, criminal or civil, or any hearing legislative or otherwise, where a citizen is asked questions which he deems improper, there arises a cause of action under the Civil Rights Statutes. That is not the law.

(c) The questions pertained to proper legislative purposes.

A legislative committee can, with complete propriety, inquire into any subject matter which arises impugning its own integrity. (*Ex parte McCarthy*, 29 Cal. 395. See also the citation from *Eisler v. U.S.*, supra, page 21 of this brief.)

Each question related to communist activities of the appellant and his association with certain people, some of whom were known communists.

It is obvious from the complaint that a committee acting within the scope of its powers (see Resolution No. 75) and investigating communist activities, which activities the Court may take judicial notice are un-American, having received from a witness affidavits on the subject of communism and having received testimony from the witness on the subject of communism in which the witness declares that he, the witness, was a former communist, upon reading his so-called petition or protest, was clearly entitled to interrogate the witness again to determine the reliability of the facts which he had theretofore given before any recommendations based upon them be made in the course of the conduct of the Committee.

(d) Resolution relating to charging appellant with a misdemeanor.

The actual resolution passed was that the counsel for the Committee be instructed to prepare the necessary complaint and follow the necessary procedure to bring the witness before the Courts in Sacramento for contempt of the Committee (T.R. 42). This was an orderly and proper step to be taken and was the natural result of a situation brought about by appellant in refusing to answer questions.

(e) The threatened expulsion of appellant's counsel from the hearing room was not improper.

The appellant had no right to be represented by counsel for the right of a witness at a legislative inquiry is a matter of grace, not of right.

Ex parte McCarthy, 29 Cal. 395, 402.

The conduct of appellant's counsel in disregarding the instructions of the appellee Tenney, Chairman of the Committee, tended to disrupt and interfere with the orderly conduct of the hearing.

(f) Matters read into the record.

These matters are referred to in plaintiff's complaint, but just how either a correct or an erroneous reception into evidence at a hearing before a committee which had neither the power to try the appellant nor deprive him of any privilege or property could give him a cause of action under the Civil Rights Statute is not pointed out in his brief, and we close our comment on this subject.

(2) The appellant was not deprived of the right of free speech.

The complaint is completely silent on any facts or circumstances which in the slightest degree indicated that he was deprived of freedom of speech. As a matter of fact, when he had the opportunity to speak, he spoke the things he wanted to say then remained silent and refused to answer any questions. (See *U. S. v. Josephson*, supra).

This subject is covered in subdivision B of Paragraph II of Part One of the brief.

It is proper to add this further thought: It is extremely doubtful whether interference with a right to petition the Legislature constitutes a violation of the Civil Rights Statute. This subject, we are informed, is being discussed in the brief of His Honor, Elmer E. Robinson. Our comment is that under the

cases of *U. S. v. Cruikshank*, 92 U.S. 542, and *Snowden v. Hughes*, 321 U.S. 1, any such conduct is a matter of exclusive state concern.

(3) The appellant was not denied the equal protection of the law.

This is a point made by appellant, but he nowhere in his brief indicated how it arises or how or in any manner he was denied the equal protection of the law. (See *Mitchell v. Greenough*, 100 F. (2d) 184, at 187.)

The unlawful administration by state officers of a State statute fair on its face resulting in its unequal application to those who are entitled to be treated alike is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. A discriminatory purpose is not presumed and the lack of any allegations in the complaint tending to show a purposeful discrimination is not supplied by the words "willful" and "malicious".

Snowden v. Hughes, supra.

There are no allegations that the Committee's action or conduct toward the appellant was any different from its action or conduct toward any other witness before it.

Paragraph 13 of the complaint fails to allege that the appellant was intentionally deprived of a political right, that is the right to petition the State Legislature. It recites that the acts of appellees were done "with malice and intent to intimidate and silence plaintiff, and deter and prevent him from effectively exer-

cising his constitutional rights of free speech and to petition the Legislature for redress of grievances". The allegation speaks only of an intent to abridge the privilege of free speech and to exercise the political right of petitioning the State Legislature. There is alleged no element of "intentional or purposeful discrimination between persons or classes".

Although these averments are immediately followed by the words "and also to deprive him of the equal protection of the laws", these words amount to nothing more than the pleader's legal conclusion.

II.

THE RESOLUTION OF THE CALIFORNIA STATE SENATE CREATING THE APPELLEES' COMMITTEE KNOWN AS THE SENATE FACT FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES IS CONSTITUTIONAL.

In appellant's complaint he alleged that he had committed no offense by his conduct before the Committee because the resolution creating it, if read into any criminal statute, is in violation of the 14th Amendment of the Constitution of the United States for want of certainty. (T.R. p. 9)

Appellant's purpose in urging the unconstitutionality of the resolution in this brief is not clear because he argues (Appellant's brief, p. 17) that inasmuch as the Committee acted under the resolution it acted under color of state law irrespective of the constitutionality of the resolution. Nevertheless the

argument is met. The same attack has frequently been made upon the act of Congress creating the United States House of Representatives Committee on Un-American Activities. (See authorities under Part 1, Subdivision III of this brief).

CONCLUSION.

It is submitted:

- (a) That the complaint does not state a cause of action, and
- (b) That the judgment of the Court below be affirmed.

Dated, San Francisco, California,
April 19, 1950.

Respectfully submitted,

HAROLD C. FAULKNER,

WILBUR F. MATHEWSON,

MELVIN, FAULKNER, SHEEHAN

& WISEMAN,

FRED N. HOWSER,

Attorney General of the State of California,

C. J. SCOTT,

Assistant Attorney General of the State of California,

FRED B. WOOD,

Attorneys for Appellees

other than Elmer E. Robinson.

No. 12,430

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,
VS.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON; CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

FILED

APR 28 1950

MARTIN J. JAPANESE, **PAUL P. O'BRIEN,**
ELMER P. DELANY, **CLERK**
1095 Market Street, San Francisco 3, California,
RICHARD O. GRAW,
De Young Building, San Francisco 3, California,
Attorneys for Appellant.

Subject Index

I.	Page
Appellant's complaint entitles him to trial.....	1
II.	
Appellee Committee and its members acting under color of State law deprived appellant of fundamental federal rights	3
(A) All actions of appellee Committee and its members complained of were done under color of State law...	4
(B) The appellee Committee and its members deprived appellant of fundamental federal rights.....	6
(1) Infringement of freedom of speech.....	7
(2) Violation of due process of law.....	9
III.	
The liability of appellee Robinson.....	10
IV.	
Conclusion	11

Table of Authorities Cited

Cases	Pages
Borden's Farm Products Co. v. Baldwin, 293 U.S. 194.....	2
Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278.....	5
Pennekamp v. Florida, 328 U.S. 331.....	8
Schneider v. Irvington, 308 U.S. 147.....	8
Screws v. United States, 325 U.S. 91.....	5
Terminiello v. City of Chicago, 93 L.Ed. Adv. Op. 865.....	7
Thornhill v. Alabama, 310 U.S. 88.....	8
United States v. Classic, 313 U.S. 299.....	5
William v. Miller, 48 Fed. Supp. 277.....	2, 3

Statutes

Civil Rights Act, Section 47(3)	10
8 U.S.C., Section 43	10
8 U.S.C.A., Section 43, Note 20.....	10

Miscellaneous

Constitution of California, Article IV, Section 37.....	6
Prosser on Torts, Hornbook Series (1941), pages 1094-5....	10

No. 12,430

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,
vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON; CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

I.

APPELLANT'S COMPLAINT ENTITLES HIM TO TRIAL.

Appellees, although they moved to dismiss appellant's complaint on the ground that it does not state a claim for relief, now seek to argue the untried facts of the case in briefs to this Court.

Appellant will not follow appellees' invasion of the province of the trier of facts.

It is appellant's contention that he has properly pleaded in his complaint that appellees did, or participated in, the acts complained of, with malice and intent to intimidate and silence appellant, and deter and prevent him from effectively exercising fundamental Federal rights, and that their actions had such intended effect on appellant. These allegations of appellant's complaint must be read in the context of the factual circumstances which are therein fully set forth.

As stated in *William v. Miller*, 48 Fed. Supp. 277, on which appellees rely:

"It is expedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer". (Words which were used by Justice Stone and Justice Cardozo concurring in *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 213.)

As also stated in *Williams v. Miller* (supra), at page 280 thereof, the United States Supreme Court, where unconstitutionality of State legislation was the contention:

"* * * held it to be error to dismiss a complaint for failure to state a cause of action when it alleged facts such that their proof might reasonably lead the Court to hold the legislation unconstitutional. *Polk Co. v. Glover*, 305 U.S. 5, 59

S.Ct. 15, 83 L.Ed. 6 supra; *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281. In both cases the Court expressly refrained from deciding that the plaintiff would be entitled to relief upon proof of the facts alleged; the determination of that question was postponed until evidence of the actual facts was before the court so that the court 'in enforcing individual rights, shall not proceed upon false assumptions' ''.

It can hardly be contended in the instant case, the complaint, accepting its allegations as true, fails to state facts "utterly unsuggestive of the invasion of any constitutional right". See *Williams v. Miller*, (supra) at page 280.

II.

APPELLEE COMMITTEE AND ITS MEMBERS ACTING UNDER COLOR OF STATE LAW DEPRIVED APPELLANT OF FUNDAMENTAL FEDERAL RIGHTS.

The gravamen of appellant's action is that appellees, acting under color of State law, deprived him of fundamental federal rights. The question before this Court necessitates not only taking appellant's pleading as true, but also examining the same as a whole and taking each of the facts alleged in context. If so read, each and every action of appellees complained of was taken as part and parcel of a preconceived plan, by means of State power vested in the appellee committee, to accomplish these infringements and violations of appellant's federal rights.

In answer to appellant's contention, appellees use the method of isolating their actions; arguing that some were not deprivative of appellant's federal rights and others were not accomplished "under color of State law".

(A) All actions of appellee Committee and its members complained of were done under color of State law.

So it is argued by appellees that the signing and filing of the criminal complaint by the chairman of appellee committee pursuant to unanimous resolution of said committee was not action "under color of State law". (Appellees' Brief, pp. 24-27.) It may well be that the act of signing and filing a criminal complaint as such is not action taken under color of State law. If, however, the action of appellees immediately preceeding the signing and filing of such complaint are given due consideration, it appears on the facts pleaded: that appellant was subpoenaed under State authority; that he was subjected to an unfair hearing under State authority; and the resolution to cause the criminal prosecution of appellant was passed by the State Legislative Committee in question—it follows that the signing and filing of the criminal complaint cannot be divorced from appellees' common plan to intimidate appellant and effectively deter him from pursuing his lawful criticism of the committee in question in his attempt to persuade the legislature to discontinue appropriations of funds for said committee.

Appellees also argue that the sending of the State telegrams signed by the appellees Tenney and Burns as chairman and vice chairman of appellee committee, and paid for by State funds, was not action under color of State law. This argument not only ignores the common plan pleaded in the complaint as a whole, but is contrary to the express language in each of said State telegrams which were set forth *in haec verba* and made a part of appellant's complaint, to wit:

*"On Behalf of the Senate Committee, We Urge You to Charge Brandhove with Perjury * * *"*.
(Italics supplied.) (T.R. p. 25, 24.)

Appellees seem also to rely on the assertion that the California State Legislature recessed before the hearing complained of took place.

This assertion is immaterial on the ground that the appellee committee and its members would have been acting "under color of State law" even if the committee had no authority to hold a hearing during a recess of the Legislature.

See:

Screws v. United States, 325 U.S. 91, 110, 114, 115;

United States v. Classic, 313 U.S. 299, 326;

Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 287.

Moreover the Senate Resolution creating the appellee committee (T.R. pp. 12-18), pursuant to Article

IV, section 37 of the California Constitution authorized said committee to act during any such recess of the State Legislature. (T.R. pp. 14-15.)

(B) The appellee Committee and its members deprived appellant of fundamental federal rights.

In determining from the complaint in question that the federal rights of appellant were invaded by appellee committee and its members, the issue in the present case must be clearly distinguished from the issues determined in the cases concerning the Congressional Committee on Un-American Activities which are cited in appellees' briefs.

There is no question in the instant case as to appellee committee's power to summon and examine witnesses in aid of the legislative function.

Appellant's contention is that appellee committee and its members engaged in patent abuse of such power and used that power as a cloak to deprive appellant of his federal rights.

The issue before this Court is whether the committee in question can lawfully make use of its powers for the purpose of suppressing criticism and perpetuating itself by deterring a citizen from opposing an appropriation of funds for said committee in the manner here alleged.

No question is raised as to the right of appellee committee and its members to use their influence and power of persuasion to secure the continued existence of such committee. It is appellant's position, how-

ever, that for such end, they must fight in the political arena on the level of equality with others, not by abusing their public power.

(1) Infringement of Freedom of Speech.

Appellees contend that appellant's right of free speech was not infringed. This contention ignores the fact that the right of free speech is guaranteed by the Constitution not merely for the benefit of the individual who exercises that right but in order to insure the continuing existence of a democratic community.

As recently stated in *Terminiello v. City of Chicago*, 93 L.Ed. Adv. Op. 865, 867-868:

"The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger * * * That is why freedom of speech, though not absolute * * * is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

It appears to be appellees' position that since they did not expressly prohibit further dissemination by

appellant of his petition and his ideas therein expressed, no infringement of the right of free speech was perfected.

The constitutional right of free speech is protected against more subtle attacks than such express prohibitions. Where, as here, State authority is used as a pervasive threat by creating a situation and atmosphere of fear and danger for him who speaks, a violation of this fundamental right is effected.

In the words of the United States Supreme Court:

“This Court has characterized the freedom of speech and that of the press as fundamental rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free governments by free men * * *. In every case, therefore, where legislative abridgement is asserted, the Courts should be astute to examine the effect of the challenged legislation * * *. And so, as cases arise, the delicate and difficult task falls upon the Courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.” (*Schneider v. Irvington*, 308 U.S. 147, 161-162.)

“The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” (*Thornhill v. Alabama*, 310 U.S. 88, 101-102.)

See also: *Pennekamp v. Florida*, 328 U.S. 331.

(2) Violation of Due Process of Law.

It cannot be seriously questioned that the issue of violation of due process of law has been properly raised by appellant's complaint. To conclude otherwise would mean to say that a State legislative committee, becoming aware of a citizen's criticism and protest against a further appropriation of funds for that committee, for the purpose of suppressing that criticism, can act as judge and *accused* in the same cause; that such committee can lawfully and while the citizen is actually engaged in such criticism, subpoena him to appear at a hearing without disclosing in such subpoena the purpose thereof, and at such hearing, in addition to interrogating the citizen with questions, sworn answers to which that committee had previously obtained from that citizen, can vilify and discredit that citizen by reading into the record of such hearing a false alleged criminal record of that citizen; a newspaper article wherein an affidavit of that citizen was called a "tissue of lies"; and an alleged telephonic statement that that citizen "was a liar"; and further at such hearing can deter and intimidate that citizen by interrogating his counsel, present thereat with permission of such committee, and without justification or excuse, threaten expulsion of such counsel from the hearing room.

If such is a fair and impartial hearing as contemplated under the XIV Amendment of the Constitution of the United States, then appellant admits that he has failed to state a claim for relief on such ground.

III.

THE LIABILITY OF APPELLEE ROBINSON.

An action for damages for deprivation of civil rights sounds in tort.

See: 8 *U.S.C.A.*, section 43 note 20, and cases there cited.

The concept of conspiracy in tort law is historically coincident with the analogous concept of the criminal law.

See: Prosser on Torts, Hornbook Series (1941) pp. 1094-5. As stated by said author, citing cases:

“All those who actively participate in a tortious act by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts, done for their benefit, are equally liable with him. Express agreement is not necessary and all that is required is that there should be a common design or understanding even though it be a tacit one”.

No further discussion is necessary to show that appellant's complaint states facts sufficient to constitute a claim for relief against this appellee. It is irrelevant in this case whether the liability of appellee Robinson is predicated solely on section 43 of *U.S.C. Title 8* or upon that section and section 47(3) of the Civil Rights Act. In answer to said appellee's contention that no violation of the equal protection clause of the Federal Constitution was effected and therefore no violation of section 47(3) of the Civil Rights Act, the Court will observe from the facts pleaded

that appellant and his counsel were singled out for obvious unfair treatment as witnesses at the hearing in question which warrants appellant's contention that the equal protection clause was violated as to him.

IV.

CONCLUSION.

It is respectfully submitted that appellant is entitled to a trial against each appellee on his complaint.

Dated, San Francisco, California,
April 26, 1950.

MARTIN J. JARVIS,
ELMER P. DELANY,
RICHARD O. GRAW,
Attorneys for Appellant.

No. 12,430

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM PATRICK BRANDHOVE,
vs. *Appellant,*

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee); HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON; CLYDE A. WATSON and ELMER E. ROBINSON,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

**APPELLANT'S PETITION FOR A REHEARING
WITH REGARD TO APPELLEE ROBINSON.**

MARTIN J. JARVIS,
ELMER P. DELANY,
1095 Market Street, San Francisco 3, California,
RICHARD O. GRAW,
Standard Oil Building, San Francisco 4, California,
Attorneys for Petitioner-Appellant.

CLERK

Subject Index

	I.	Page
Introductory statement		2

II.

A conspiracy is an agreement or understanding between two or more parties to do an unlawful thing, or to do a lawful thing in an unlawful manner; the conspiracy is complete on the forming of the agreement or understanding, and the performance by any conspirator of any act to effect the object of the conspiracy..... 2

(A) Historically the writ of conspiracy was employed in the case of combinations of two or more persons to abuse legal procedure. When the law developed, an action on the case was fashioned to extend criminal liability as well as liability in court beyond the active wrongdoer to those who have planned, assisted or encouraged his acts 2

(B) Where there was an agreement or understanding relating to the commission of a tort or crime, responsibility as a conspirator attaches to every one participating in such agreement or understanding if any of the participants has taken action to effect the object of the conspiracy 3

(C) It is immaterial whether each of the conspirators acting alone could have committed the crime or tort in question; it is undisputed that a defendant may be charged with a conspiracy if he participated in an agreement or understanding relating to an offense or tort which one of his co-conspirators could commit... 5

III.

In a conspiracy case facts must be pleaded connecting each of the defendants with the alleged unlawful agreement or understanding, the purpose of that agreement or understanding, the condition of mind of a conspirator and at least one overt act of any of the conspirators to effect the purpose of the conspiracy 6

	Page
(A) Where a conspiracy is alleged, the objective as well as subjective elements of the conspiracy must be properly pleaded	6
(B) In pleading the objective elements of a conspiracy the defendant must be connected with the express or tacit agreement; the purpose and the unlawfulness of the agreement must appear and at least one act taken by one of the conspirators in effectuating the purposes of the agreement	6
(C) In determining the requirements as to the pleading of the objective elements of a conspiracy, weight must be given to the consideration that conspiracy is generally locked within the breasts of the conspirators and must therefore be inferred from circumstances..	7
(D) Rule 9(b) of the Federal Rules of Civil Procedure for the District Courts of the United States governs the pleading of the subjective elements of a conspiracy..	9

IV.

In the light of the substantive law and the rules of pleading applicable to an action for conspiracy it can hardly be questioned that appellant has sufficiently stated his case against appellee Robinson	11
--	----

V.

Conclusion	17
------------------	----

Table of Authorities Cited

Cases	Pages
Connolly v. Gishwiller, 162 F. (2d) 428.....	5, 8
Continental Collieries v. Shobar, 130 F. (2d) 631.....	7, 12
Downs v. United States, 3 F. (2d) 855.....	5
Johnson v. Minnesota Amusement Co., 3 Fed. Rules Serv. 8 a 477, case 2	7
Johnson v. United States, 158 F. 69.....	5
Lange v. Heckel, 171 Wis. 59, 175 N.W. 788.....	7
Love v. Comm. Cas. Ins. Co., 26 Fed. Supp. 481.....	10
MacDonald v. Winfield Corp., 12 Fed. Rules Serv. 12 b 34, case 3, 82 Fed. Supp. 929	7
People v. Small, 319 Ill. 437, 150 N.E. 435.....	8
Picking v. Penn. Railway Co., 151 F. (2d) 240.....	5
Pinkerton v. United States, 151 F. (2d) 499.....	3
Reitmeister v. Reitmeister, 162 F. (2d) 691.....	5
U. S. v. Griffith Amusement Co., 3 Fed. Rules Serv. 12 e 231, case 5	6

Texts

5 A.L.R. 787	5
74 A.L.R. 1114	5
11 Am. Jur. 547, footnote 7.....	5
2 Moore, Fed. Prac. 2d Ed., Section 9.03.....	10
Prosser, On Torts, page 1095	3

Rules

Federal Rules of Civil Procedure, Rule 9 (b).....	9
Rules of the United States Court of Appeals, Rule 25.....	2

No. 12,430

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-
FINDING COMMITTEE ON UN-AMERI-
CAN ACTIVITIES (a California Legis-
lative Committee); HUGH M. BURNS;
NELSON S. DILWORTH; FRED H.
KRAFT; LOUIS G. SUTTON; CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

**APPELLANT'S PETITION FOR A REHEARING
WITH REGARD TO APPELLEE ROBINSON.**

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant, William Patrick Brandhove, hereby pe-
titions this Honorable Court for rehearing in the
above-entitled cause with regard to appellee Elmer E.

Robinson pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit, and his petition respectfully shows:

I.

INTRODUCTORY STATEMENT.

It is respectfully submitted that, if the heretofore settled law as to the requirements of a conspiracy and the pleading of a claim for relief for conspiracy are applied to this case, such conspiracy has been properly pleaded against appellee Robinson requiring a rehearing in this cause. In support of this statement it will be necessary to discuss the substantive law and the rules of pleading relating to conspiracies, as well as the application of both to appellant's pleadings concerning appellee Robinson.

II.

A CONSPIRACY IS AN AGREEMENT OR UNDERSTANDING BETWEEN TWO OR MORE PARTIES TO DO AN UNLAWFUL THING, OR TO DO A LAWFUL THING IN AN UNLAWFUL MANNER; THE CONSPIRACY IS COMPLETE ON THE FORMING OF THE AGREEMENT OR UNDERSTANDING, AND THE PERFORMANCE BY ANY CONSPIRATOR OF ANY ACT TO EFFECT THE OBJECT OF THE CONSPIRACY.

- (A) Historically the writ of conspiracy was employed in the case of combinations of two or more persons to abuse legal procedure. When the law developed, an action on the case was fashioned to extend criminal liability as well as liability in Court beyond the active wrongdoer to those who have planned, assisted or encouraged his acts.

The historical development of the responsibility of the conspirator in tort actions and criminal actions

has been stated by Prosser, On Torts, p. 1095, as follows:

“The original writ of conspiracy was employed only in the case of combinations of two or more persons to abuse legal procedure, and was the forerunner of the action for malicious prosecution. This was replaced at a later date by an action on the case in the nature of conspiracy, and the word gradually came to be used to extend liability in tort, as well as crime, beyond the active wrongdoer to those who have merely planned, assisted or encouraged his acts.”

- (B) Where there was an agreement or understanding relating to the commission of a tort or crime, responsibility as a conspirator attaches to every one participating in such agreement or understanding if any of the participants has taken action to effect the object of the conspiracy.

In *Pinkerton v. United States*, 151 F. (2d) 499, the Court stated at p. 501:

“ ‘A “conspiracy” is an agreement [or understanding] between two or more parties to do an unlawful thing, or to do a lawful thing in an unlawful manner’. (Words and Phrases, Perm. Ed., Vol. 8 ‘Conspiracy’, page 718.) ‘The conspiracy is complete on the forming of the criminal agreement, and the performance of at least one overt act in furtherance thereof’. *Hall v. United States*, 10 Cir., 109 F. 2d 976, 984.”

It is immaterial who has taken the overt act required. As also stated in *Pinkerton v. United States*, *supra*, at p. 500:

“Although conspiracy be not charged, if it be shown by the evidence to exist, *the act of one or*

more defendants in furtherance of the common plan is in law the act of all. (Davis v. United States, 5 Cir., 12 F. 2d 253, 257.)” (Emphasis added.)

These rules are in harmony with the law as pronounced by the United States Supreme Court in the same case. In the words of the United States Supreme Court:

“The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under Section 37 of the Criminal Code, 18 U.S.C.A. Section 88, 7 F.C.A. title 18, Section 88. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. But as we read this record, that is not this case.” (*Pinkerton v. United States of America*, 328 U.S. 640, 647, 90 Law. Ed. 1489, 1496-1497.) See also, *Fiswick v. United States of America*, 329 U.S. 211, 216, 91 Law. Ed. 196, 200.

Where there is a wrongful agreement or understanding, it is therefore immaterial whether a particular defendant who participated in the agreement or understanding, did any overt act to effect the object thereof. If any other participant in the agreement or understanding took action, any acts of such other participants for the purpose of effecting the objects of the agreement are to be considered as acts of each participant.

- (C) It is immaterial whether each of the conspirators acting alone could have committed the crime or tort in question; it is undisputed that a defendant may be charged with a conspiracy if he participated in an agreement or understanding relating to an offense or tort which one of his co-conspirators could commit.

As stated in *Johnson v. United States*, 158 F. 69:

“A defendant therefore may be convicted of a conspiracy to commit an offense when in the nature of things he could not have committed the offense himself, if it be an offense which one of his coconspirators could commit.” See also *Downs v. United States*, 3 F. (2d) 855, 857; *Picking v. Penn. Railway Co.*, 151 F. (2d) 240; 11 *Am. Jur.* 547, footnote 7; 5 *A.L.R.* 787; 74 *A.L.R.* 1114.

The same rules apply to an action in damages for conspiracy as to a criminal action for conspiracy. (*Reitmeister v. Reitmeister*, 162 F. (2d) 691; *Connolly v. Gishwiller*, 162 F. (2d) 428.)

III.

IN A CONSPIRACY CASE FACTS MUST BE PLEADED CONNECTING EACH OF THE DEFENDANTS WITH THE ALLEGED UNLAWFUL AGREEMENT OR UNDERSTANDING, THE PURPOSE OF THAT AGREEMENT OR UNDERSTANDING, THE CONDITION OF MIND OF A CONSPIRATOR AND AT LEAST ONE OVERT ACT OF ANY OF THE CONSPIRATORS TO EFFECT THE PURPOSE OF THE CONSPIRACY.

- (A) Where a conspiracy is alleged, the objective as well as subjective elements of the conspiracy must be properly pleaded.

A cause of action for conspiracy involves objective as well as subjective elements. The objective facts required for such a cause of action are the existence of an unlawful agreement or understanding and an overt act to effect the object thereof. Subjectively, a defendant cannot be made responsible as a conspirator unless he has taken part in an express or tacit agreement or understanding in the state of mind of a conspirator. The above elements must therefore be pleaded.

- (B) In pleading the objective elements of a conspiracy the defendant must be connected with the express or tacit agreement; the purpose and the unlawfulness of the agreement must appear and at least one act taken by one of the conspirators in effectuating the purposes of the agreement.

“There must be alleged certain acts of each of the alleged conspirators which would connect him or it with the conspiracy, and after the conspiracy has once been shown to exist, the overt act of any one of the alleged conspirators would be binding upon all”. *U. S. v. Griffith Amusement Co.*, 3 Fed. Rules Serv. 12 e 231, Case 5.

“The rule seems to be in conspiracy cases that—if the pleader sets out with reasonable certainty and definiteness the various causes which resulted

in his injury and connects the plaintiff's (defendant's) joint action with the same, and if from all of the allegations of the complaint considered together, the defendant is reasonably informed of the character of the charges, so that he will be enabled to prepare for his defense—the pleadings should be sustained.” *Johnson v. Minnesota Amusement Co.*, 3 Fed. Rules Serv. 8 a 477, case 2.

“There is no justification for dismissing a complaint for insufficiency of statement, *except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim.*” (Emphasis added.) *Continental Collieries v. Shober*, 130 F. (2d) 631, 635; see, *MacDonald v. Winfield Corp.*, 12 Fed. Rules Serv. 12 b 34, case 3, 82 Fed. Supp. 929.

- (C) In determining the requirements as to the pleading of the objective elements of a conspiracy, weight must be given to the consideration that conspiracy is generally locked within the breasts of the conspirators and must therefore be inferred from circumstances.

In shaping the requirements as to the pleading of an agreement or understanding in the nature of a conspiracy, Courts have never ignored what has been drastically stated in *Lange v. Heckel*, 171 Wis. 59, 64, 175 N.W. 788, 789, as follows:

“Conspiracy is a line of endeavor the success of which is not promoted by advertising. Direct proof of the illegal combination is generally locked within the breasts of the conspirators, and the ultimate fact of the corrupt agreement, if proved at all, must be inferred from established facts and circumstances.”

This statement of the Wisconsin Court has been cited with approval in *Connolly v. Gishwiller*, 162 F. (2d) 428, 433. In the same case the Court of Appeals for the Seventh Circuit cited with approval from *People v. Small*, 319 Ill. 437, 449, 150 N.E. 435, 440:

“Considered separately the acts of a conspiracy are rarely of an unequivocally guilty character, and they can be properly estimated only when connected with all the surrounding circumstances.”

In the words of the Court of Appeals in the *Connolly* case at page 433:

“A conspiracy is very nearly always from the nature of things, provable only by circumstantial evidence, by inferences reasonably deducted from facts proven. *It may be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation, the intimacy and relation of the parties at the time of the commission of the acts, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy.*” (Emphasis added.)

See also *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-399, 92 Law. Ed. 746, 765-768. In that case the United States Supreme Court restated the rule that to prove a conspiracy in violation of the anti-trust laws, proof of an express understanding that each party would sign improper agreements is unnecessary, and that, when a group of competitors enter into a series of separate but similar agreements with competitors or others, a strong inference

arises that such agreements are the result of concerted action, which inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan. Because the District Court in that case had not followed this rule, a great number of its findings were repudiated by the United States Supreme Court.

It can hardly be questioned, therefore, that where the collective interest of the alleged conspirators clearly appears together with the intimacy and relation of the alleged conspirators at the time of the commission of the tort and their close cooperation with regard to the overt acts effectuating the alleged conspiracy, it cannot be required of a plaintiff to allege in his pleadings all details of the unlawful agreement or understanding. If the circumstances under which the understanding took place and its unlawful purposes are pleaded, a pleader has done everything that can be reasonably required of him.

(D) Rule 9 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States governs the pleading of the subjective elements of a conspiracy.

Rule 9 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States provides among other things:

“Malice, intent, knowledge and other condition of mind of a person may be averred generally.”
(Emphasis added.)

It follows that evidentiary facts or any other facts concerning a conspirator's state of mind at the time

of the unlawful agreement or understanding need not be pleaded, but that it is sufficient to plead that the person charged as a conspirator acted with the same intent as the actual wrongdoers.

In refuting a construction contrary to the clear wording of the rule, it was stated in *Love v. Comm. Cas. Ins. Co.*, 26 Fed. Supp. 481, 482:

“The rule above quoted, however, is very clear and is not open to any such construction as contended for by the defendants. This rule very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22, which provides that, whenever it is material to allege malice, etc. it shall be sufficient to allege same as a fact without setting out the circumstances from which it is to be inferred.”

In discussing the rule, the commentator of the Federal Rules states:

“Conditions of the mind such as malice, intent, or knowledge may be averred generally since specific averment is normally well nigh impossible, unless all the evidence bearing thereon is set out at length.” 2 Moore, Fed. Practice, 2d Ed., Sec. 9.03 and cases cited in footnote 15 at p. 1911.

IV.

IN THE LIGHT OF THE SUBSTANTIVE LAW AND THE RULES OF PLEADING APPLICABLE TO AN ACTION FOR CONSPIRACY IT CAN HARDLY BE QUESTIONED THAT APPELLANT HAS SUFFICIENTLY STATED HIS CASE AGAINST APPELLEE ROBINSON.

This Court mentions in its opinion the fact that appellee Robinson was not himself acting officially or under color of authority. No holding is based or could be based on this fact. The other defendants unquestionably wielded state power or acted under color of authority, so that if a conspiracy existed between Robinson and them, it makes no difference with regard to the responsibility of Robinson as a conspirator that he, acting alone, could not have committed the alleged tort. It cannot be seriously contended, that a special rule applies to conspiracies relating to violations of the Civil Rights Act, and that with regard to such conspiracies, each conspirator acting alone must be able to commit the tort in question. Such rule, if applicable to Civil Rights actions, would permit politicians, with impunity, to persuade state officials to abuse their power in violation of the federal rights of political opponents of those who exercise such influence.

It is elementary that in determining the propriety of a complaint, the complaint must be read as a whole, and with a view to give proper effect to the intent therein expressed, rather than to defeat its purpose. As stated above, "there is no justification for dismissing a complaint * * * except where it appears to a certainty that the plaintiff would not be entitled to

relief under any state of facts which could be proved in support of his claim.” (*Continental Collieries v. Shobar*, 130 F. (2d) 631, 635.)

In the instant case the complaint alleged among other things that in the petition circulated by appellant among the legislators in Sacramento, the subject matter thereof was stated in such manner that the appellee Committee was charged to have used plaintiff as an instrument to smear Congressman Franck R. Havenner as a “Red”, when he was campaigning against Elmer E. Robinson as a candidate for mayor of San Francisco in 1947 and that Robinson conspired with the Committee to this end. This statement of the complaint (Transcript p. 4) made it quite clear that the interests of appellee Committee and appellee Robinson coincided in this entire matter. A copy of said petition was attached to the complaint as Exhibit “B” and made a part thereof by reference. The petition clearly involved serious charges against appellee Robinson. The complaint further alleges that appellee Tenney, before the service of the subpoena on appellant and after the content of said petition had become known to him, immediately communicated by telephone with appellee Robinson advising him of the charges contained in said petition and the stated purpose of same. (Transcript p. 5.) The complaint then states: “Then and there said defendants Jack B. Tenney and Elmer E. Robinson discussed ways and means of best thwarting the charges contained in said petition and defeating the purpose stated in said petition and agreed that a hearing should be held on the fol-

lowing day by the Tenney Committee, whereat defendant Elmer E. Robinson should appear as voluntary witness and deny the truth of the charges with reference to him and his connection with the Tenney Committee contained in said circulated petition.” (Transcript pp. 5-6.) The complaint further states that at the hearing Robinson appeared as a voluntary witness, that all individual defendants except Elmer E. Robinson were sitting as members of the Tenney Committee, that the hearing of the Committee was held “*as was known to all defendants*, for the purpose and object of suppressing the criticism of plaintiff in his circulated petition and the charges therein directed against the Tenney Committee and the individual defendants, to the end that said Committee should obtain the appropriation of funds requested from the California Legislature.” (Transcript pp. 6 and 7.) (Emphasis added.) Including *all defendants* this allegation included knowledge of appellee Robinson of the purpose and object of said hearing. As to the conduct of the hearing it was alleged that Robinson was permitted to and did make a lengthy unsworn statement first, and after having been sworn as a voluntary witness, was led by appellee Tenney to and did answer the different charges contained in appellant’s petition whereby unbridled discretion was left to appellee Robinson in the conduct of his self-justification. (Transcript p. 7.) The transcript of the hearing before the Tenney Committee was attached to the complaint as Exhibit “F” and by reference made part of the complaint. This transcript shows the unsworn statement

of appellee Robinson from which it appears that Robinson was intensely interested in refuting the charges directed against him in the petition before the Committee which, as he well knew, had the same interests in the matter as he had and was acting as judge and accused in the same case. (Transcript pp. 45-46.) This also appears from the statement of Robinson at the hearing (Transcript p. 48): "I feel as a citizen, I am entitled to the right to refute that evidence at any time this Committee is willing to hear me. The hearing is on; this man has submitted evidence, he calls it evidence, and offers it in the record, and I demand the right to refute the statements contained in that document." Whereas appellant had made it entirely clear that he considered the hearing of the Tenney Committee as improper and consequently had offered no evidence, appellee Robinson ignored and misstated this fact because of his urgent desire in cooperation with the Committee to use this hearing as a forum for his own and the Committee's justification. All these allegations contained in the complaint or appearing from exhibits which were made part thereof by reference, must be read in connection with paragraph 13 of the complaint, which stated as to all appellees including Robinson:

"The acts of defendants above set forth were done or participated in by said defendants with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of

the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter and prevent and deprive plaintiff."

In addition thereto paragraph 14 of the complaint alleged among other things:

"All defendants including defendant Elmer E. Robinson conspired for all of the aforesaid purposes and acted in furtherance of said conspiracy in the manner hereinabove set forth." (Emphasis added.)

It can hardly be questioned that all necessary objective facts of a conspiracy were sufficiently pleaded by the allegations that appellee Tenney and appellee Robinson discussed ways and means of thwarting the charges contained in appellant's petition to the California Legislature and agreed that the holding of a hearing of the Tenney Committee with Robinson appearing as a voluntary witness denying the truth of the charges against himself and the Committee would be the best means to the end of thwarting the charges and defeating the purpose stated in the petition; that Robinson knew that the purpose and object of the hearing was to suppress the criticism of appellant to the end that the Committee acting as judge and accused in the same case should obtain the appropriation of the funds requested from the Legislature; that the purpose of all actions in question, including the agreement or understanding between appellees Tenney and

Robinson, was to intimidate and silence plaintiff and deter and prevent him from exercising his right of free speech and other federal rights. There can be no question that sufficient overt acts of appellee Tenney were alleged for the purpose of effectuating the purposes of the understanding. In appraising the understanding it must be conceded that the words uttered by appellees Tenney and Robinson alone are not decisive, but that a tacit as well as an expressed meeting of the minds to intimidate and deter appellant would be sufficient to satisfy the requirements of a conspiracy. Since the existence of a conspiracy was clearly alleged and the purposes of the conspiracy were set forth in paragraph 13 of the complaint, the sole question which can be raised is whether the facts provable under the allegations of the complaint, will or will not convince a jury that there was a conspiracy for the purpose alleged in the complaint. Even if this Court could determine whether the facts alleged could possibly convince a jury of the existence of such a conspiracy, this Court could not question that from all the facts and the whole atmosphere referred to in the complaint and to be shown by the evidence thereunder, a jury could infer that a conspiracy as alleged did exist.

With respect to Robinson's state of mind as a conspirator the allegations of the complaint clearly satisfy the requirements of the pertinent federal rule.

V.

CONCLUSION.

It is respectfully submitted that for the reasons above stated a rehearing should be granted and the judgment of dismissal reversed as to appellee Robinson.

Dated, San Francisco, California,
July 26, 1950.

MARTIN J. JARVIS,
ELMER P. DELANY,
RICHARD O. GRAW,
Attorneys for Petitioner-Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing appellant's petition for a rehearing with regard to appellee Robinson is well founded and that the same is not interposed for delay.

Dated, San Francisco, California,
July 26, 1950.

MARTIN J. JARVIS,
*One of the Attorneys for
Petitioner-Appellant.*

No. 12,430

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

VS.

JACK B. TENNEY, THE SENATE FACT-
FINDING COMMITTEE ON UN-AMER-
ICAN ACTIVITIES (a California Legis-
lative Committee), HUGH M. BURNS,
NELSON S. DILWORTH, FRED H.
KRAFT, LOUIS G. SUTTON, CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

PETITION OF APPELLEES OTHER THAN
ELMER E. ROBINSON FOR REHEARING
in which is contained a request that this Court
grant a hearing in bank.

HAROLD C. FAULKNER,
WILBUR F. MATHEWSON,
MELVIN, FAULKNER, SHEEHAN & WISEMAN,
1101 Balfour Building, San Francisco 4, California,
FRED N. HOWSER,

Attorney General of the State of California,

C. J. SCOTT,
Assistant Attorney General of the State of California,
Library & Courts Building, Sacramento 14, California,

RALPH N. KLEPS,

J. D. STRAUSS,

A. C. MORRISON,

995 Market Street, San Francisco 3, California,

*Attorneys for Appellees and Petitioners
other than Elmer E. Robinson.*

FILED
28 1950
O'BRIEN,
CLERK

Subject Index

	Page
Grounds for rehearing	2
Argument	4
I.	
The right involved was not freedom of speech; it was the right to petition the California Legislature.....	4
II.	
Right to petition the California Legislature is not one secured to appellant by the Constitution or laws of the United States	6
III.	
The court has rewritten the complaint to charge reprisal....	12
IV.	
The judiciary has not the power to inquire into the motives of the legislative branch of the government.....	15
V.	
The state legislators of California are exempt from civil liability	27
VI.	
The general allegation of malice and intent is not enough...	29
VII.	
The complaint is neither a short nor a plain statement of the claim of appellant.....	34
Conclusion	36

Table of Authorities Cited

Cases	Pages
Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672.....	8, 9
Alpers v. San Francisco (Circuit Court, Northern District, California, 1887), 32 Fed. 503.....	21
Barsky v. United States, 167 F. (2d) 241.....	18, 20, 23, 25
Breedlove v. Suttles, 302 U.S. 277, 58 S. Ct. 205.....	11
Cochran v. Couzens, 42 F. (2d) 783.....	28
Collins v. Riley, 24 Cal. (2d) 912.....	28
Crandall v. Nevada, 73 U.S. 35.....	7
Dennis v. United States, 171 F. (2d) 986.....	17, 18, 25
Dodez v. Wegandt, 173 Fed. 967.....	29
Eisler v. United States, 170 F. (2d) 273.....	17, 18, 25
Ex parte McCarthy, 29 Cal. 395.....	28
Gibson v. Reynolds, 172 F. (2d) 95.....	29
Guinn v. United States, 238 U.S. 347, 35 S. Ct. 926.....	11
Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S. Ct. 954	7
Hardyman et al. v. Collins et al., decided May 29, 1950....	8
Hearst v. Black, 87 F. (2d) 68.....	20, 21, 22, 28
Hurtado v. California, 110 U.S. 516.....	8
Kilbourn v. Thompson, 103 U.S. 168.....	27
Marshall v. Gordon, 243 U.S. 521, 37 S.Ct. 448.....	24
Maxwell v. Dow, 176 U.S. 581.....	8
McGrain v. Daugherty, 273 U.S. 135, 47 S. Ct. 319.....	23, 24
New Orleans Water Works Co. v. City of New Orleans, 164 U.S. 483, 17 S. Ct. 161.....	22
Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397.....	11
Spalding v. Vilas, 161 U.S. 483.....	28
Tompsett v. Ohio, 146 Fed. (2d) 95.....	8
Townsend v. United States, 95 F. (2d) 352.....	19

	Pages
United States v. Bryan, 72 F. Supp. 58.....	28
United States v. Crosby, 1 Hughes 448, Fed. case No. 14,893	8
United States v. Cruikshank, 92 U.S. 542.....	6, 7, 8

Constitutions

Constitution of the State of California:

Article I, Section 9	5
Article I, Section 10	5

Constitution of the United States:

Article IV, Section 4	27
First Amendment	4, 16, 25
Fourteenth Amendment	8, 17, 25
Fifteenth Amendment	11

Other Authorities

54 C.J.S. 915	31
Federal Rules of Civil Procedure, Rule 8(a) (2)	34

No. 12,430

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY, THE SENATE FACT-
FINDING COMMITTEE ON UN-AMER-
ICAN ACTIVITIES (a California Legis-
lative Committee), HUGH M. BURNS,
NELSON S. DILWORTH, FRED H.
KRAFT, LOUIS G. SUTTON, CLYDE A.
WATSON and ELMER E. ROBINSON,
Appellees.

**PETITION OF APPELLEES OTHER THAN
ELMER E. ROBINSON FOR REHEARING
in which is contained a request that this Court
grant a hearing in bank.**

To the Honorable William Healy, Judge of the United States Court of Appeals for the Ninth Circuit, and William C. Mathes and Samuel L. Driver, United States District Judges, and as to the request for a hearing in bank To All of the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

We solicit the Court's special attention to this petition for the reason that this is a case of first impression, one of vital interest to the State of California because of its great impact upon its legislative process; that the Court's decision is based upon a theory of law and fact never considered by the Court below, never advanced by the appellant and never briefed by the parties.

A rehearing and a hearing in bank is sought in a sincere belief that the opinion filed herein on the 30th day of June, 1950, is in error in law.

GROUND'S FOR REHEARING.

(The order of presentation has no relation to relative importance.)

I. The Right Involved Was Not Freedom of Speech; It Was the Right to Petition the California Legislature.

II. The Right to Petition the California Legislature Is Not One Secured to Appellant by the Constitution or Laws of the United States.

III. The Court Has Rewritten the Complaint to Charge Reprisal.

IV. The Judiciary Has Not the Power to Inquire Into the Motives of the Legislative Branch of the Government.

V. The State Legislators of California Are Exempt From Civil Liability.

VI. The General Allegation of Malice and Intent Is Not Enough.

VII. The Complaint Is Neither a Short Nor a Plain Statement of the Claim of Appellant.

This is a case presenting fundamental questions of Constitutional law pertaining to the relationship between the Federal and State Governments and to the respective powers of the Courts and the Legislature. This is a case of first impression in the following respects:

This is the first case in which it has been held that the right to petition a state legislature is a right secured to the citizen by the Constitution of the United States.

This is the first case in which it has been held that the lawfulness or unlawfulness of legislative acts depends solely upon the motive of the members of the legislature.

This is the first case in which a citizen of a state who has exercised his right as a citizen of the state to petition a state legislature with respect

to a purely state matter has asked for and, by the ruling of this Court has obtained, the intervention of a United States Court to compel state legislators to justify their conduct and answer in damages for conduct in the performance of their lawful functions.

ARGUMENT.

I.

THE RIGHT INVOLVED WAS NOT FREEDOM OF SPEECH; IT WAS THE RIGHT TO PETITION THE CALIFORNIA LEGISLATURE.

The right of appellant, if any is here involved, was not the right of freedom of speech, it was rather the right to petition the legislature for redress of a grievance.

The appellant circulated the petition among members of the State Legislature only; he did not circulate it among members of the general public nor did he attempt to do so. He did not address nor attempt to address any group or public or private body.

The rights are not one and the same. They are expressed in different *clauses* of Amendment I to the Constitution of the United States and different *sections* of the Constitution of the State of California.

Amendment I of the Constitution of the United States provides:

“Amendment I—Freedom of Religion. Congress shall make no law respecting an establishment of

religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Article I, Sec. 9 of the Constitution of the State of California provides:

“Liberty of Speech and of the Press. Sec. 9. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *”

Article I, Sec. 10 of the Constitution of the State of California provides:

“Right to Assemble and to Petition. Sec. 10. The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances.”

The right to petition is distinct and separate from the right of assembly.

We state as positively as it is possible to declare that there isn't a scintilla of fact pleaded in this case which relates to “Freedom of Speech”, “Equal Protection of the Law”, “Due Process of the Law”, “Infringement of Equal Privilege and Immunities as a Citizen of the United States”. Each is merely a phrase written in the complaint. There remains but one thing, and that is the right to petition the legislature for

redress of grievances. The Court held in this opinion that appellant exercised that right. This determination should have ended this case, because the claim for relief of appellant (as found by the Court) is based upon the interference with the exercise of a right which was actually exercised.

II.

RIGHT TO PETITION THE CALIFORNIA LEGISLATURE IS NOT ONE SECURED TO APPELLANT BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

This point was urged to this Court in our brief. The present decision not only does not decide the point; it does not even refer to it.

Although the right to petition is a fundamental one it is a right limited to the "citizen" not the individual. It is a fundamental right not conferred by either the Constitution of the United States or of the State of California but rather secured to the citizens of each sovereign by the Constitutions thereof.

United States v. Cruikshank, 92 U.S. 542, 552.

Being an attribute of "citizenship" it necessarily follows that the right of a citizen of the United States to petition his *government* differs from the right of a citizen of the State of California to petition *the legislature*.

Hence the right of a citizen of California to petition the State Legislature is not one secured to him

by the Constitution or laws of the United States and is subject only to State jurisdiction.

United States v. Cruikshank, supra, p. 551.

It is only the right to petition the United States Government which being an attribute of national citizenship is secured and protected by the Constitution of the United States.

United States v. Cruikshank, supra.

See also

Crandall v. Nevada, 73 U.S. 35, 44.

There is nothing to the contrary to be found in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S. Ct. 954, for there the assemblies sought to be eliminated were for the purpose of discussing National rather than State legislation.

“The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment by Section 1 of the Fourteenth Amendment; and whether R.S. Sec. 1979 and Section 24(14) of the Judicial Code afford redress in a federal court for such abridgment. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge.”

We respectfully submit that the present decision is in conflict with the reasoning, holding and cases cited

by this Court in its opinion in *Hardyman et al. v. Collins et al.*, decided May 29, 1950.

The Fourteenth Amendment is the Constitutional authority for the Civil Rights Acts; the extent of their application is limited by the scope of the Amendment.

United States v. Cruikshank, supra.

Not only is the right to petition the State Legislature not one of the rights set out in the Bill of Rights, but it is also true that the due process clause of the Fourteenth Amendment did not require the State to give to its citizens all the rights secured to the citizen of the United States by the Bill of Rights.

These rights are many, here are a few:

Right to trial by jury in a State Court.

Tompsett v. Ohio, 146 Fed. (2d) 95.

Freedom from unreasonable searches and seizures.

United States v. Crosby, 1 Hughes 448, Fed. case No. 14,893.

Right to indictment by Grand Jury.

Maxwell v. Dow, 176 U.S. 581.

Prohibition against self-incrimination.

Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672.

Right to be charged by indictment in felony cases.

Hurtado v. California, 110 U.S. 516.

The political relation between the State and its citizens is free from federal interference. Such freedom is essential in preserving the balance between the na-

tional and state power. As stated in the *Adamson* case, *supra*, at pages 1675 and 1676:

“The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Feldman v. United States*, 322 U.S. 487, 490, 64 S. Ct. 1082, 1283, 88 L. Ed. 1408, 154 A.L.R. 982. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence, secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The *Slaughter-House* cases decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. *Maxwell v. Bugbee*, 250 U.S. 525, 537, 40 S. Ct. 2, 5, 63 L. Ed. 1124; *Hamilton v. Regents*, 293 U.S. 245, 261, 55 S. Ct. 197, 203, 79 L. Ed. 343. This power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in *Twining v. New Jersey*, 211 U.S. 78, 91-98, 29 S. Ct. 14, 16-19, 53 L. Ed. 97. ‘The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state.’ The *Twining* case likewise disposed of the contention that freedom from testimonial

compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. *Twining v. New Jersey*, supra, 211 U.S. at pages 98, 99, 29 S.Ct. at page 19, 53 L. Ed. 97; *Palko v. Connecticut*, supra, 302 U.S. at page 328, 58 S. Ct. at page 153, 82 L. Ed. 288. After declaring that state and national citizenship co-exist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power."

Except as limited by the Fifteenth Amendment the State has complete power over suffrage. As stated in *Guinn v. United States*, 238 U.S. 347, 35 S. Ct. 926, 930.

“Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.”

Cf. *Breedlove v. Suttles*, 302 U.S. 277, 58 S. Ct. 205.

The cases dealing with national as contrasted with State elections should not be confused. Those involve an entirely different principle namely, that the federal government has exclusive control, should it choose to exercise it, over the relation between the federal government and its citizens which it may protect from state interference.

Likewise the right to become a candidate for a state office is a right or privilege of state not national citizenship and is not secured a person by the Constitution of the United States.

Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397.

III.

**THE COURT HAS REWRITTEN THE COMPLAINT
TO CHARGE REPRISAL.**

The Court's opinion is based upon the concept that the complaint states a claim for relief for damages for reprisal, punishment and oppression the consequence of appellant's having exercised his right of freedom of speech. This appears from the affirmative finding in the opinion which conforms to the record that:

“True, the Committee did not prevent him from exercising his right; he did succeed in making his message public.” (Page 5, paragraph 3.)

and the statement:

“Appellant is entitled not only to exercise the right but to be protected against official reprisal for having exercised it. And considering his pleading as a whole it is rationally possible to believe that the Committee purposely undertook, under an appearance of regularity, to intimidate, punish and oppress him for having done what he did.”

The complaint itself is not only barren of any allegations of reprisal or of punishment or oppression (even the words “punish and oppress” appear in the opinion alone and not in the pleading) but it affirmatively appears that it is the gravamen of the appellant's complaint that it was the purpose of the Committee to deprive him of the right of petitioning the legislature and that he was so deprived.

The purpose of the Committee hearing is set out in paragraph 7 of the complaint (Transcript p. 6) as follows:

“Said hearing of the Tenney Committee on January 29, 1949, was held, as was known to all defendants, for the *purpose and object of suppressing the criticism of plaintiff* in his circulated petition and the charges therein directed against the Tenney Committee and the individual defendants, to the end that said Committee should obtain the appropriation of funds requested from the California legislature.” (Italics added)

The motive and intent are alleged in paragraph 13 of the complaint (Transcript p. 10, Court’s opinion p. 4, paragraph 2) as follows:

“The acts of defendants above set forth were done or participated in by said defendants with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech *and to petition the Legislature for redress of grievances*, and also to deprive him of the equal protection of the law, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter and prevent and deprive plaintiff.” (Italics added)

The purpose and intent appear to have been to deter and prevent appellant from effectively exercising his right to petition the legislature of the State of California. One cannot deter or prevent an accomplished act, the pleader referred to future contemplated acts.

Of the words “intimidate, punish, and oppress” appearing in the Court’s opinion as “rationally possible to believe” with respect to the Committee’s purpose only the word “intimidate” appears in the complaint and there it was used to allege a purpose to “silence” plaintiff.

That such was the pleader’s theory is likewise demonstrated not only by his failure to cite the case relied upon by the Court for support of this doctrine, namely the case of *Bomar v. Keyes*, but also by his initial and continued reliance upon the theory that appellant was denied constitutional rights because of the unconstitutionality of the Committee itself.

It is very apparent that the complaint was inspired by the hope that the Supreme Court of the United States might hold the Congressionally created Committee on Un-American Activities unconstitutional. (In this connection note Paragraph 11 of Brandhove’s complaint and Brandhove’s application to the Supreme Court for release on a Writ of Habeas Corpus.)

Shortly before or about the time of the filing of the complaint the Circuit Courts of the United States upheld the constitutionality of the Congressional Committee on Un-American Activities and the Supreme Court refused to disturb said holdings.

Thus the decision upholding the complaint on the theory that reprisal may constitute an interference with a constitutional right was

- (1) Not urged to nor passed upon by the lower Court, whose decision is being reviewed;
- (2) Not briefed by either party to this Court.

This is a far different case than *Bomar v. Keyes*, supra. There the reprisal was taking away a job.

What does the reprisal consist of here? The lawful convening of a committee; the lawful subpoenaing of a witness. After that everything that occurred resulted from the conduct of Brandhove at the committee hearing. Brandhove's contempt was an intervening act which broke a causal connection between circulating the petition and what transpired in the committee meeting after his flagrant contempt.

IV.

THE JUDICIARY HAS NOT THE POWER TO INQUIRE INTO THE MOTIVES OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT.

The Court in its opinion conceded that the acts of the Committee were lawful and that they were conducted in a lawful manner. It is admitted that the appellant was not deprived of his right to petition the State Legislature. Therefore to spell out a claim for relief on behalf of the appellant the Court necessarily and in apparent reliance upon the *Bomar* case held that a claim for relief would be stated if the lawful acts of the Committee were the result of malice and to effectuate an intent to punish and oppress appellant for having exercised his right. Thus, the existence or non-existence of a claim for relief on the part of ap-

pellant depends upon the motive and intent of the Committee. It is therefore respectfully submitted that there can be no claim for relief which depends upon the existence or non-existence of such a motive in a legislative committee because it is not within the power of this Court to inquire into that motive.

On the basis of the authorities cited by appellees in their brief part I, subdivision 3 thereof, pages 18 and 19 the creation of the committee was within the constitutional powers of the legislature.

It has been held uniformly in the many cases to be hereinafter cited that the Federal Courts have no power to inquire into the motives of committees created by Congress once it has been determined that the committees were created within the constitutional powers of the Congress and the scope of the inquiry of the Committee did not exceed the limits set by a possible legislative purpose.

If it be suggested that the cases to be cited are dissimilar because they do not involve the Civil Rights Acts it should be noted at the outset that the Court in this case and the Courts in the cases to be cited were all asked to find the action of the committees unconstitutional because their actions infringed upon the right of individuals secured by the First Amendment of the Constitution.

In the cases to be cited the prohibitions of the First Amendment were applied directly, that is, to the direct action of Congress. In this case the prohibitions of the First Amendment are still sought to be

applied not directly but by virtue of the provisions first of the Fourteenth Amendment and secondly, of the Civil Rights Acts. Thus, the power of this Court to inquire into the motives of the legislative Committee is no greater than the power of this or the other Federal Courts to inquire into the motives of the committees created by Congress.

In *Dennis v. United States*, 171 F. (2d) 986, 988, the Court stated:

“Once the rule has been established that the creation of the Committee was within the constitutional powers of the Congress (as has been well established by the three cases noted supra), it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution.”

In the case of *Eisler v. United States*, 170 F. (2d) 273, 278, the Court stated:

“During the course of the trial defense counsel sought to introduce evidence to show that the Committee’s real purpose in summoning appellant was ‘to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress’ powers.’ The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees.”

Although the Court did not cite any authority for the propositions quoted above the Court will observe that both the *Dennis* and *Eisler* cases were decided by the United States Court of Appeals, District of Columbia and in both cases the Court consisted of Associate Justices Clark, Prettyman and Proctor. Previous to the decision of the Court in the *Dennis* and *Eisler* cases the same Court with Associate Justices Clark, Prettyman and Edgerton had decided the case of *Barsky v. United States*, 167 F. (2d) 241, in which case the Court stated:

“Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Eminent persons have stated similar views. But such matters are not for the courts. We so held in *Townsend v. United States*, citing *Hearst v. Black*. The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. ‘It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.’ The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused ‘affords no ground for denying the power.’ The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and administrative, from liability for damage done by their acts or speech, even though know-

ingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammelled freedom of legislative and administrative activity, within the respective powers of the legislature and the executive.”

In the *Townsend* case cited by the Court (*Townsend v. United States*, 95 F. (2d) 352 at page 361), the Court stated:

“Because a witness could not understand the purpose of cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The orderly processes of legislative inquiry require that the committee shall determine such questions for itself. *Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations.* *Hearst v. Black*, 66 App. D.C. 313, 87 F.2d 68. A witness may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is bound rightly to construe the statute. *Sinclair v. United States*, *supra*, 279 U.S. 263, at page 299, 49 S.Ct. 268, 273, 73 L.Ed. 692. Beyond this, he must conform to the procedure of the committee and respond to its questions. *McGrain v. Daugherty*, *supra*, 273 U.S. 135, at pages 175, 176, 47 S.Ct. 319, 329, 71 L.Ed. 580, 50 A.L.R. 1. He cannot be heard to plead justification and, hence, lack of

willfulness in defiantly leaving a hearing because he does not like the questions propounded to him—remedy by objection and refusal to answer both being open to him.” (*Italics added.*)

In the case of *Hearst v. Black*, also cited by the Court in the *Barsky* case (*Hearst v. Black*, 87 F. (2d) 68 at pages 71 and 72), the Court stated:

“The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant’s legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. *On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.*

The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the

others. 'This separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism.' Springer v. Philippine Islands, 277 U.S. 189, 201, 48 S.Ct. 480, 482, 72 L.Ed. 845." (Italics added.)

Among the cases relied upon by the Court in the *Hearst* case was the case of *Alpers v. San Francisco* (Circuit Court, Northern District, California, 1887), 32 Fed. 503, in which in an opinion by Circuit Justice Field it was stated:

"The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity. This no one will question as applied to the power of the legislature of the state. *The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends.* Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one

case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of the contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary.” (Italics added.)

Another case relied upon by the Court in the *Hearst* case was the case of *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 483, 17 S. Ct. 161, in which it was stated in an opinion by Justice Harlan at page 165:

“If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. *It ought not to attempt to do indirectly what it could not do directly.* In view of the adjudged

cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption." (Italics added.)

The Court in the *Barsky* case also relied upon the historical case of *McGrain v. Daugherty*, 273 U.S. 135, 47 S. Ct. 319.

At page 329 the Court clearly held that even the abusive and oppressive use of the power of inquiry by a Congressional Committee affords no ground for denying the power and that the relief to be afforded an individual who is subject to such oppressive and abusive use of the power consists of the right to refuse to answer such questions or to the right of Writ of Habeas Corpus if he is incarcerated for refusing to do so. The Court stated in this connection:

"The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume,

for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson* and *Marshall v. Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.”

In the *McGrain v. Daugherty* case the Court cited as one of the authorities the case of *Marshall v. Gordon*, 243 U.S. 521, 37 S.Ct. 448, where the Court in determining the extent of the legislative power to punish for contempt in a case which was similar to the one at bar inasmuch as it arose out of an irritating and ill-tempered statement addressed to Congress in a letter, the Court stated with respect to the power of Congress to punish for a contempt for an obstruction of the exercise of the legislative power:

“And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.”

It thus seems to be clearly established that the Federal Courts do not have the power to inquire into

the motives of the legislative departments of the Federal or of the State Governments; that the power of the Court in this case can be no greater than the power of the Courts to inquire into the motives of the Congressional Committees for the only justification for such inquiry would be the application of the provisions of the First Amendment to the Constitution of the United States in the one case directly and in the other case by virtue of the provisions of the Fourteenth Amendment and the Civil Rights Acts and the Fourteenth Amendment and the Civil Rights Acts can do no more than apply the provisions of the First Amendment to the acts of the State and it is apparent from the foregoing authorities that the fundamental requirement of a separation of powers has precluded the inquiry by the judiciary into the motives of the legislative branch of the government.

It is apparent from the decision that the Court below relied heavily upon the decision in the *Eisler* and *Dennis* cases. The *Eisler* case and the *Barsky* case state flatly that the judicial power may not be used to scrutinize the motives of the committee. This Court has held that this committee acted in a lawful manner, but that its motives when inquired into may give rise to a claim for relief under the Civil Rights Acts. Thus the effect of the holding here is in direct conflict with the holding in the cases cited. The purpose of the investigation of Un-American Activities of necessity involves freedom of the press, freedom of speech, freedom to assemble, and when the speech

and the writing and the assemblage of people engaged in un-American activities are hereafter to be the subject matter of an investigation by a lawfully constituted committee, exercising constitutional powers to do such investigating, those investigating must face a claim for damages under the Civil Rights Acts upon the bare declaration that the act committed is in reprisal for having exercised free speech, freedom of the press, and the freedom to assemble because the witness claimed malice. That is the holding of this Court, for this Court holds that the motives which prompt a legislative body, acting through a committee (but why not the Legislature itself?), may be scrutinized by the judicial branch of the government. The republican form of government does not contemplate this power in the judiciary.

We urged this point strongly to the lower Court and to this Court. The present decision passes this point, that goes to a "basic and vital" power of a Legislature to act independently of the judiciary on matters within the scope of the Legislature's power, without discussion or even comment.

We respectfully urge that the Legislature of the State of California is entitled to have this point determined. It is vital to its own existence, and thus we request a hearing in bank.

V.

**THE STATE LEGISLATORS OF CALIFORNIA ARE EXEMPT
FROM CIVIL LIABILITY.**

Section 4 of Article IV of the Constitution provides, among other things, as follows:

“The United States shall guarantee to every state in this Union a republican form of government * * *.” As part of a republican form of government it is unquestioned “that all of the powers entrusted to government, whether state or national, are divided into three grand departments, the executive, the legislative and the judicial.” The privileges secured to members of the legislative body, both state and federal, by which they are exempt from civil responsibility for their acts, resulting from the nature and in the execution of their office, are definite and positive. The leading case on this subject is *Kilbourn v. Thompson*, 103 U.S. 168. The discussion on this interesting subject starts on page 201. In reading this case, we suggest that the language of Mr. Chief Justice Parsons, quoted with approval, be considered. Again with approval, the Supreme Court quotes the following:

“Mr. Justice Story (sect. 866 of his Commentaries on the Constitution) says: ‘The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the

legislation of every State in the Union as matter of constitutional right.' ”

See, also:

Collins v. Riley, 24 Cal. (2d) 912, 915;

Ex parte McCarthy, 29 Cal. 395;

Hearst v. Black, supra;

United States v. Bryan, 72 F. Supp. 58;

Cochran v. Couzens, 42 F. (2d) 783;

Spalding v. Vilas, 161 U.S. 483.

We urge to the Court:

1. That a member of the State Legislature of California is immune from civil liability for acts done during the performance of his legislative duty.

2. That when this Court determines that the meeting was within the power of the Committee to call and that the subpoenaing of Brandhove was within its power, state legislators are immune from civil liability for their acts during the course of the meetings lawfully held.

3. That the right of Brandhove stems from a statute; the immunity of the Legislature stems from the Constitution. Under these circumstances the constitutional rights of the legislators are paramount.

4. That a construction of the Civil Rights Act as paramount to the right of members of the State Legislature derived from the Constitution of the United States would be unconstitutional and void.

VI.

**THE GENERAL ALLEGATION OF MALICE AND
INTENT IS NOT ENOUGH.**

As a matter of pleading it is submitted the allegations with respect to the motive or intent of the Committee are general allegations and are not supported by the specific facts pleaded.

The Court apparently believes that the rule to be applied is that the specific facts alleged need only tend to support the general allegation, for this Court stated at page 4 of its opinion:

“The conclusions are of ultimate fact and some of them appear not to be without a measure of support in the circumstances disclosed.”

This holding is in direct conflict with the rule in cases of this kind that the general allegation of malice and intent must be substantiated by specific facts pleaded and that the Court will examine the complaint with meticulous care to determine that this is done.

Gibson v. Reynolds, 172 F. (2d) 95 (cited with approval in *Dodez v. Wegandt*, 173 Fed. 967).

The *Gibson* case, *supra*, was an action brought by a Jehovah witness against the members of a local draft board, the Selective Service Appeal Board, the State Director of Selective Service for Arkansas and his assistant, the chief of the legal division for the Arkansas State Directors seeking damages for alleged improper classification of appellant under the Selective Training and Service Act of 1940. The com-

plaint, one for damages under the Civil Rights Act as well as for malicious prosecution, was dismissed on motion on the ground that the appellees in classifying appellant were acting within the scope of their authority and duty imposed and conferred upon them by the Selective Service Act and were not subject to a civil action for damages on account of such acts.

It was in connection with such allegations relating to the malice of the defendants that the Court made the following statement which seems particularly applicable to this case:

“We do not scrutinize with meticulous nicety the allegations of a complaint when appraising its sufficiency on motion to dismiss. The contrary is the established rule. *Dennis v. Village of Tonka Bay*, 8 Cir., 151 F.2d 411, and cases there cited. But when a litigant contends that the factual allegations of his complaint demonstrate that a group of public officers, presumed to have done their duty, were guilty of such wanton, spiteful, malicious prejudice that their acts, ostensibly done in the performance of their statutory duties, were therefore not acts done ‘in relation to or connected with’ those duties but were in fact vengeful acts committed for the purpose of personally injuring the litigant, *the reviewing court must examine those factual allegations with meticulous care to determine whether such a case is stated.*” (Italics added.)

The Court here not only did not apply this rule but on the contrary indicated that it was satisfied with the general allegation of malice and intent. It did not examine the other allegations with meticulous

care to see that they supported the general allegation and the language of the opinion indicates that it did not.

The gravamen of the appellant's claim for relief appears to be in paragraph 13. The first part charges: The acts of defendants above set forth were done or participated in by said defendants with: (1) malice; (2) intent to prevent him from exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances; (3) and also to deprive him of, and here is alleged phrases from the Constitution which has no relation whatsoever to any facts pleaded in the complaint.

In respect to number 2 above, the Court has held in its opinion and the pleading shows on its face that he was not silenced and that he did exercise and was not actually interfered with in the exercise of this right. It appears implicit in this decision that if the motive of the committee was malicious the appellant has a claim for relief and that there was malice as a matter of law.

There can be no malice where a lawful act is involved and the means employed are lawful.

“Malice in law exists where a wrongful act is intentionally done without just cause or excuse, but since malice in law is predicated on the doing of an unlawful act or the doing of a lawful act in an unlawful manner, it cannot exist where the thing done is lawful and the means employed are lawful.”

54 *C.J.S.* 915.

This Court recognizes that the subpoena issued was lawful; the hearing held was lawful, and at the time of the hearing there existed within the committee power to hold the meeting. This is true under the law of California and is recognized in the present decision of this Court. Brandhove was in open defiance and contempt of the committee at the very commencement of the hearing. It must be borne in mind he was permitted by the committee to present and make part of the record the inflammatory petition which he had already circulated in the Capitol of Sacramento until the Legislature adjourned. If we read the opinion of the Court correctly, it appears they frown on the fact that two of the defendants in this case sent telegrams to district attorneys in San Francisco and Alameda County, suggesting that they act against Brandhove, or impanel a Grand Jury for that purpose. Can there be any question that this is lawful? It would seem to be completely in accordance with their duties as State Legislators.

After the hearing was completed as to Brandhove and after his open defiance of the committee was manifested, the chairman of the committee read into the record what has been called a false criminal record of Brandhove. The Court condemns this act. But the question arises whether this act can give rise to a cause of action under the Civil Rights Statute. This Court, scrutinizing this act, condemns it; but no constitutional right of this plaintiff was infringed. The committee had no power to punish Brandhove; it had no power resembling the act of the Board of Educa-

tion in the *Bomar v. Keyes* case. It could certainly have had no effect on the man for when he left the hearing chambers he could go out and make all the speeches he desired to make and to continue to present his petition to anyone in the State Capitol. In his pleading he makes no claim that he intended to pursue any course of future action which was interfered with. The complaint on its face shows the appellant was represented by counsel; that he was not timid but bold.

Consider the effect of the act condemned by this Court. If it gives rise to a cause of action under the Civil Rights Act, is a State Prosecutor subject to a claim for civil damages if he introduces incompetent evidence against a defendant who had recently been engaged in petitioning Congress or making public speeches? This Court, in reconstructing the cause of action of the plaintiff, has created a mantle of immunity which may be donned by any person, and particularly persons engaged in subversive activities, and thus stultify orderly law and process of law.

The rioter engaged in the so-called exercise of his right of free speech, who breaks a window or commits an assault, in this decision has created for him a claim for relief under the Civil Rights Act if he alleges his subsequent arrest was as an act of reprisal for having exercised the right of free speech.

We respectfully submit that the deprivation of the right to work, which actually occurred as a result of the action of the Board of Education, is a far different case than an error committed in the admission of

evidence at a hearing in a legislative committee discharging a legislative function in a lawful manner. The importance of this subject, that of creating a claim for relief on the theory of reprisal when a State Legislative Committee is involved, we respectfully submit should be re-examined and the Court, we request, should permit the re-examination before this Court in bank.

VII.

THE COMPLAINT IS NEITHER A SHORT NOR A PLAIN STATEMENT OF THE CLAIM OF APPELLANT.

The general rules of pleading of the Federal Rules of Civil Procedure require a short and plain statement of the claim showing that the pleader is entitled to relief.

Rule 8(a) (2) Fed. Rule Civ. Procedure.

The complaint is neither a short statement nor a plain statement. Seventy-two pages of the Transcript of Record are required to set out the complaint. That the Court recognized that the complaint is not short appears from the statements of the Court:

On page 2 there appears the statements:

“The complaint incorporates an extensive amount of evidentiary matter, * * *”

“The particulars of the charge are lengthy but unimportant here.”

On page 4 there appears the statement:

“Appellant’s complaint pieces together these proceedings and incidents, plus the sending by the

Committee of two telegrams described in the footnote.”

That the Court likewise recognizes that the complaint is not a plain statement of the claim for relief appears from the language appearing on page 6 of the opinion:

“Our purpose is merely to point out that the alleged circumstances of this case are *too ambiguous and complex* to warrant judgment on the complaint alone.” (Italics added.)

That the complaint is not plain is demonstrated by the conclusion of the Court that the pleading states a claim for relief for damages for reprisal, punishment and oppression for the exercise of a constitutional right. The theory of the complaint as written was not based on the theory of the Court as to its sufficiency.

The appellant in his complaint as written failed to state a claim for relief; the appellant in his brief failed to sustain a claim for relief; the appellant in his oral argument was unable to present a situation stating grounds for relief.

This Court has created the claim for relief for the appellant.

Appellant made no effort to amend his “ambiguous and complex” complaint.

We respectfully submit on this phase, the appellees should not be called upon to answer this complaint; the charge is so ambiguous that the claim for relief

this Court found was not discernible either to the appellant or the appellees or to their counsel.

CONCLUSION.

Our petition is for a rehearing. We respectfully request that the hearing be in bank.

We respectfully submit that the Court was in error in reading into appellant's complaint something that is not there and then sustaining its sufficiency. In stressing the motive of malice pleaded by appellant, the Court failed to apply the rule that malice in law does not exist where an act is lawfully done in a lawful manner. Further, a defendant should not be required to answer a complaint on its face "ambiguous and complex".

Fundamental and vital legal questions are involved in this appeal, none of which are even referred to in the opinion, much less discussed or decided:

A. The right to petition the California Legislature is not one secured to appellant by the Constitution or laws of the United States.

B. The judiciary has not the power to inquire into the motives of the legislative branch of the government.

We further urge:

C. State legislatures are immune from civil liability.

The impact of the present opinion upon the Legislature of the State of California is obvious. The ques-

tions resolved in this case by this Court, as the opinion presently stands, can not help having a serious effect on the right of the people to elect representatives to execute the functions of their office without fear of prosecution, civil or criminal.

The Court here has decided the motives prompting lawful acts of State Legislators acting as such may be inquired into by the Judiciary. The authorities seemed uniform to the contrary until this decision. We earnestly urge a re-examination of the entire appeal.

Dated, San Francisco, California,
July 28, 1950.

HAROLD C. FAULKNER,
WILBUR F. MATHEWSON,
MELVIN, FAULKNER, SHEEHAN & WISEMAN,
FRED N. HOWSER,

Attorney General of the State of California,

C. J. SCOTT,

Assistant Attorney General of the State of California,

RALPH N. KLEPS,

J. D. STRAUSS,

A. C. MORRISON,

*Attorneys for Appellees and Petitioners
other than Elmer E. Robinson.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellees and petitioners other than Elmer E. Robinson in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,

July 28, 1950.

WILBUR F. MATHEWSON,

*Of Counsel for Appellees and Petitioners
other than Elmer E. Robinson.*

No. 12431

United States
Court of Appeals
for the Ninth Circuit.

DEAN ACHESON, Secretary of State of the
United States,

Appellant,

vs.

YEE KING GEE by YEE DON FOUND, his next
friend,

Appellee.

Transcript of Record

Appeal from the United States District Court,

Western District of Washington

Northern Division.

MAR 9 - 1950

PAUL P. O'BRIEN,
CLERK

No. 12431

United States
Court of Appeals
for the Ninth Circuit.

DEAN ACHESON, Secretary of State of the
United States,

Appellant,

vs.

YEE KING GEE by YEE DON FOUND, his next
friend,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	6
Appeal:	
Appellant's Statement of Points on.....	16
Certificate of Clerk to Record on.....	77
Notice of.....	16
Praecipe and Designation of Record on...	17
Appellant's Statement of Points on Appeal...	16
Appellant's Statement of Points and Designa- tion of Portions of Record.....	80
Certificate of Clerk U. S. District Court to Record on Appeal.....	77
Complaint	2
Declaratory Judgment of Citizenship.....	14
Findings of Fact and Conclusions of Law....	9
Names and Addresses of Counsel.....	1
Notice of Appeal.....	16
Praecipe and Designation of Record on Appeal	17

INDEX	PAGE
Transcript of Trial Proceedings.....	19
Court's Oral Decision.....	66
Witnesses, Plaintiff's:	
Yee Don Found	
—direct	21
—cross	46
—redirect	55
Yee King Gee	
—direct	56
Yee Shee	
—direct	58
—cross	61
—redirect	62, 63
—recross	62, 63

NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS,

United States Attorney,
1017 U.S. Court House,
Seattle 4, Washington,

Attorney for Appellant.

J. P. SANDERSON,

301-2 Second & Cherry Bldg.,
Seattle 4, Washington,

Attorney for Appellee.

GERALD SHUCKLIN of

HILE, HOOF & SHUCKLIN,
533 Dexter Horton Bldg.,
Seattle 4, Washington,

Attorney for Appellee.

United States District Court, Western District
of Washington, Northern Division

No. 1922

YEE KING GEE, by YEE DON FOUND, his next
friend,

Plaintiff,

vs.

GEORGE C. MARSHALL, Secretary of State of
the United States,

Defendant.

COMPLAINT

Comes now Yee King Gee, by his next friend,
plaintiff herein, and for cause of action alleges as
follows:

I.

That plaintiff Yee King Gee is an infant of the
age of Six (6) years, and brings this action through
his father and next friend, Yee Don Found, a citi-
zen of the United States.

II.

That defendant George C. Marshall is the duly
appointed, qualified and acting Secretary of State
of the United States; that the American Consul
General at Canton, China, is an official of the State
Department of the United States acting under the
direction of George C. Marshall as Secretary of
State of the United States.

III.

That jurisdiction of this action is conferred upon this Court by Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 USCA 903.

IV.

That plaintiff Yee King Gee is an American National, born March 16, 1941, in Suey Lung village, Hoi San, Kwangtung, China, and is now there; that Yee King Gee is the son of Yee Don Found who is a citizen of the United States by virtue of Section 1993 of the Revised Statutes of the United States; that Yee King Gee claims his permanent residence as Seattle, Washington, where his father resides.

V.

That the American Consul General at Canton, China, has refused to recognize the American nationality claimed by plaintiff herein on the ground that the said Yee Don Found did not reside continuously in the United States for a period of ten (10) years next prior to the birth of plaintiff herein on March 16, 1941, and has refused to issue to said plaintiff a passport or travel document so that he could obtain transportation, come to the United States and apply for admission into the United States as a national thereof.

VI.

That Section 201(g) of the Nationality Act of 1940, 8 USCA 601, provides:

“The following shall be nationals and citizens of the United States at birth:

* * *

(a) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien * * *.”

VII.

That the said Yee Don Found arrived in the United States at Boston, Massachusetts on August 6, 1929, at the age of seventeen years, when he was admitted as a citizen of the United States by the Immigration Service and issued Certificate of Identity No. 61814 dated September 3, 1929, File 2500/8382; that thereafter the said Yee Don Found made two temporary visits to China as follows: Departed from the United States subsequent to August 11, 1936, and from Vancouver, British Columbia, August 29, 1936 on the Steamship Talthebius, and returned to the United States at Seattle, Washington, August 9, 1938; departed from Seattle, Washington, January 6, 1940 and returned via San Francisco on the Steamship President Coolidge; that on each of said trips Yee Don Found had in his possession a Citizen's Return Certificate, Form 430, issued by the Immigration Service without time limitation; that Yee Don Found is a bona fide

and established resident of Seattle, Washington, residing at #400 Aurora Avenue.

VIII.

That the two visits to China aforesaid made by Yee Don Found were for the purpose of visiting his relatives and for no other reason; that the said Yee Don Found never intended to abandon his United States residence; that he has in fact resided continuously in the United States since August 6, 1929, being more than ten years prior to the birth of the plaintiff herein on March 16, 1941.

IX.

That photographs of Yee Don Found and Yee King Gee showing a good present likeness are attached hereto.

Wherefore, plaintiff prays for an order and judgment of this Court as follows:

1. Declaring the plaintiff Yee King Gee to be a national of the United States.

2. Granting to the plaintiff herein such other and further relief as may be just in the premises.

/s/ J. P. SANDERSON,

/s/ GERALD SHUCKLIN,

Attorneys for Plaintiff.

Photographs of Yee Don Found and Yee King Gee attached.

[Endorsed]: Filed January 16, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now George C. Marshall, Secretary of State of the United States of America, defendant above named, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and John E. Belcher, Assistant United States Attorney, and for answer to plaintiff's complaint, admits, denies, and alleges:

I.

Answering paragraph I of plaintiff's complaint, this answering defendant is without information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

II.

Answering paragraph II of plaintiff's complaint, defendant admits the same.

III.

Answering paragraph III of plaintiff's complaint, defendant denies the jurisdiction of this court, but alleges the fact to be that jurisdiction is lodged in District Court of the United States for the District of Columbia.

IV.

Answering paragraph IV of plaintiff's complaint, defendant denies that the plaintiff is an American National, is without information sufficient to form a belief as to whether plaintiff was born on the date

alleged, or that the plaintiff is the son of Yee Don Found, and therefore denies the same, and also denies that Yee Don Found is an American citizen, and especially does he deny that plaintiff is a permanent or other resident of the City of Seattle, in the State of Washington.

V.

Answering paragraph V of plaintiff's complaint, defendant admits that the American Consul General at Canton, China, has refused to recognize the American nationality claimed by plaintiff, has refused to issue to plaintiff a passport or travel document to come to the United States to make application for admission into the United States as a National thereof.

VI.

Answering paragraph VI of plaintiff's complaint, defendant admits the same.

VII.

Answering paragraph VII of plaintiff's complaint, defendant admits the same.

VIII.

Answering paragraph VIII of plaintiff's complaint, defendant denies the same and the whole thereof.

IX.

Answering paragraph IX of plaintiff's complaint, defendant admits the same.

Further Answering Plaintiff's Complaint and By Way of Affirmative Defense Thereto, This Answering Defendant Alleges and Shows:

I.

That plaintiff is not now and never has been a resident of the City of Seattle, King County, Washington, nor the Northern Division of the Western District of Washington, and by reason thereof this court is without jurisdiction over the defendant or the subject matter of this action.

II.

That defendant is located and has his office in the City of Washington in the District of Columbia and exclusive jurisdiction is by law lodged in the United States District Court for the District of Columbia.

And for a Second Affirmative Defense This Answering Defendant Shows:

I.

In the event this court takes jurisdiction of the subject matter of this action, defendant alleges the father of plaintiff, Yee Don Found, had not resided in the United States for a period of ten years at the time his alleged son, the plaintiff herein, is alleged to have been born in China, in the month of March, 1941; that said residence at said time did not exceed the period of eight years and four months, and it was for this reason that the Consul

General at Canton, China, with the approval of the State Department of the United States of America, denied plaintiff's application for a passport or travel permit to travel to the United States.

Wherefore, having fully answered, defendant prays that:

1. This court determine its own jurisdiction.
2. In the event this court determines it has jurisdiction, that upon the hearing it enter an order, judgment or decree to the effect that the plaintiff is not entitled to the relief sought or any relief whatsoever.

/s/ J. CHARLES DENNIS,
U. S. Attorney,

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed October 27, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on to be heard before the undersigned Judge of the above entitled Court upon the application of the plaintiff Yee King Gee by Yee Don Found, his next friend, under the Nationality Act of 1948, Title 8, U.S.C.A. sec. 903, for a judgment of this Court declaring him to be a

citizen of the United States and the matter coming on regularly for hearing, the petitioner appearing in Court both personally and through his counsel J. P. Sanderson and Gerald Shucklin and the defendant appearing through the United States District Attorney and the Court having listened to the evidence introduced on behalf of the plaintiff and considered arguments, statements and briefs of counsel, and having fully considered the matter, and the Court being fully advised in the premises, hereby makes the following:

Findings of Fact

I.

That plaintiff, Yee King Gee, was an infant of the age of six (6) years at the time of the commencement of this action and brought this action through his father and next friend, Yee Don Found, a citizen of the United States.

II.

That the former defendant, George C. Marshall at the time of the commencement of this action, was the duly appointed, qualified and acting Secretary of State of the United States; that during the pendency of this action Dean Acheson became the duly appointed, qualified and acting Secretary of State of the United States and is now acting in said capacity; that on April 18, 1949, Dean Acheson, as Secretary of State of the United States within six months after he assumed office was ordered by this Court to be substituted as party defendant herein;

that the American Consul General at Canton, China is and was an official of the State Department of the United States acting under direction of the Secretary of State of the United States.

III.

That jurisdiction of this action is conferred upon this Court by Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A. 903.

IV.

That plaintiff, Yee King Gee, is a national of the United States, born March 16, 1941 in Suey Lung Village, Hoi San, Kwangtung, China; that Yee King Gee is the son of Yee Don Found who is a citizen of the United States by virtue of Section 1993 of the Revised Statutes of the United States; that Yee King Gee claims his permanent residence as Seattle, Washington, where his father resides; that such claim is and has been made in good faith and upon substantial basis.

V.

That the American Consul General at Canton, China, refused to recognize the American nationality claimed by plaintiff herein on the claimed ground that Yee Don Found, plaintiff's father had not resided in the United States for a period of ten years next prior to the birth of plaintiff herein on March 16, 1941, and refused to issue to plaintiff a passport or travel document so that he could obtain transportation to the United States and apply for admission into the United States as a national

thereof; that subsequently upon appeal to the Secretary of State plaintiff was allowed to come to the United States for the purpose of prosecuting this action.

VI.

That the said Yee Don Found, father of the plaintiff, arrived in the United States at Boston, Massachusetts on August 6, 1929, at the age of seventeen years, when he was admitted as a citizen of the United States by the Immigration Service and issued Certificate of Identity No. 61814 dated September 3, 1929, File 2500/8382; that thereafter the said Yee Don Found made two temporary visits to China as follows: Departed from the United States subsequent to August 11, 1936, and from Vancouver, British Columbia, August 29, 1936, on the Steamship Talthybus, and returned to the United States at Seattle, Washington, August 9, 1938; departed from Seattle, Washington, January 6, 1940, and returned via San Francisco on the Steamship President Coolidge; that on each of said trips Yee Don Found had in his possession a Citizen's Return Certificate, Form 430, issued by the Immigration Service without time limitations; that Yee Don Found is a bona fide and established resident of Seattle, Washington.

VII.

That the two visits to China aforesaid made by Yee Don Found were for the purpose of visiting his relatives and for no other reason; that the said Yee Don Found never intended to abandon his

United States residence; that he has in fact resided in the United States since August 6, 1929, being more than ten years prior to the birth of the plaintiff herein on March 16, 1941, as required by Section 201 (g) Nationality Act of 1940, Title 8 U.S.C.A., Section 601.

Done in Open Court this 8th day of September, 1949.

/s/ LLOYD L. BLACK,

U. S. District Judge.

From the foregoing Findings of Fact, the Court now makes the following:

Conclusions of Law

I.

That plaintiff Yee King Gee is entitled to have his United States citizenship confirmed by an appropriate decree of this Court which has jurisdiction under section 503 of the Nationality Act of 1940, Title 8, U.S.C.A., Section 903.

Done in open Court this 8th day of September, 1949.

/s/ LLOYD L. BLACK,

U. S. District Judge.

Approved as to form.

/s/ JOHN E. BELCHER,

Asst. U. S. Attorney.

Received a copy of the within Findings this 1st day of Sept., 1949.

/s/ J. CHAS. DENNIS,

Attorney for Defendant.

[Endorsed]: Filed September 8, 1949.

In the United States District Court for the Western
District of Washington, Northern Division

No. 1922

YEE KING GEE, by YEE DON FOUND, his next
friend,

Plaintiff,

vs.

DEAN ACHESON, Secretary of State of the
United States,

Defendant.

DECLARATORY JUDGMENT OF CITIZENSHIP

This matter having come on to be heard before the undersigned Judge of the above entitled Court upon the application of the plaintiff Yee King Gee by Yee Don Found, his next friend, under the Nationality Act of 1948, Title 8, U.S.C.A. sec. 903, for a judgment of this Court, declaring him to be a citizen of the United States and the matter coming on regularly for hearing; the petitioner appearing in Court both personally and through his counsel J. P. Sanderson and Gerald Shucklin and the defendant appearing through the United States District Attorney and the Court having listened to the evidence introduced on behalf of the plaintiff and considered arguments, statements and briefs of counsel, and having fully considered the matter, and having heretofore filed its Findings of Fact

and Conclusions of Law, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiff Yee King Gee, whose photograph, initialed by the undersigned, is attached hereto, and made a part hereof, is hereby declared to be a citizen of the United States by reason of the fact that the petitioner is the foreign born blood son of a United States citizen, to-wit: Yee Don Found, and Yee King Gee is therefore himself a United States citizen under Section 201 (g) Nationality Act of 1940, Title 8, U.S.C.A., Section 601.

This Judgment is made pursuant to, and under the authority of Section 503 of the Nationality Act of 1940, Title 8, U.S.C.A., Section 903.

Done in open Court this 8th day of September, 1949.

/s/ LLOYD L. BLACK,

U. S. District Judge.

Approved as to form.

/s/ JOHN E. BELCHER,

Assistant U. S. Attorney.

Photograph, initialed L.L.B., of Yee King Gee attached.

Receipt of copy acknowledged.

[Endorsed]: Filed September 8, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Yee King Gee, plaintiff herein, and Yee Don Found, his next friend, and to J. P. Sanderson and Gerald Shucklin, attorneys:

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Declaratory Judgment of Citizenship entered in the above court on the 8th day of September, 1949.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed November 8, 1949.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

The points involved in this appeal are questions of law:

1. Did the District Court for the Western District of Washington have jurisdiction of this proceeding?

2. Where a minor child born in China in 1941 as the lawful issue of the marriage of an American male citizen and a Chinese woman, which minor child had never been in the United States, can such minor child claim as his residence the domicile of his father, who resides in Seattle?

3. If the father of such minor child had not resided in the United States for a period of ten years immediately preceding the birth of that child in China, is the child a national of the United States, under the provisions of 8 U.S.C.A., Sec. 601(g)?

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 14, 1949.

[Title of District Court and Cause.]

PRAECIPE AND DESIGNATION OF
RECORD ON APPEAL

To: The Clerk of the Above Entitled Court:

The above named defendant does hereby designate the following portions of the records and proceedings in the above entitled cause for inclusion in the record on appeal to the United States Court of Appeals, and requests the Clerk to prepare and

transmit the same within the time required by law:

1. Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.
4. Judgment.
5. Notice of Appeal with date of filing.
6. This designation.
7. Statement of points on appeal.
8. Transcript of trial proceedings.
9. All exhibits.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 14, 1949.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1922

YEE KING GEE, by YEE DON FOUND, his next
friend,

Plaintiff,

vs.

DEAN ACHESON, Secretary of State of the
United States,

Defendant.

May 10, 1949.

Black, J.

Appearances:

GERALD SHUCKLIN,

Attorney at Law, appearing for and on
behalf of plaintiff.

J. CHARLES DENNIS,

United States Attorney, appearing for and
on behalf of defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS

The Court: There is on the calendar for this
time the petition of Yee King Gee by his next
friend, Yee Don Found, to be declared a citizen.

How long, Counsel, do you think the hearing will
take?

Mr. Shucklin: We should finish today, [1*] today, your Honor.

Mr. Dennis: It is Mr. Belcher's case, and it might take a little longer on that account.

The Court: My recollection was that it was Mr. Belcher's confident opinion that it would take about an hour.

Mr. Dennis: This morning is the first time I have had opportunity to study it.

(Discussion between Court and Counsel and opening statement by Mr. Shucklin.)

The Court: Do you have any opening statement, Mr. Dennis, at this time?

As I understand it, both sides agree that the father of this petitioner was not physically present in the United States a total of ten years prior to the birth of the petitioner.

Mr. Shucklin: Yes, your Honor.

The Court: There may be some difference of a few days or a few weeks, but the aggregate period of physical presence in the United States in any event would not be as much as ten years.

Mr. Shucklin: That is correct.

The Court: That is one of the main issues in this case.

Mr. Dennis: The only other issue, as I [2] understand, is whether this Court has jurisdiction——

The Court: ——or whether the action should be brought in the District of Columbia.

Mr. Dennis: Yes.

The Court: That is why I said the question of eight years and some months physical presence was one of the main question in this case.

Mr. Shucklin: Of course, the other question is this: we claim the domicile of the father is the domicile of the infant.

The Court: When did the infant get here?

Mr. Shucklin: 1949.

The Court: When did the mother actually get here?

Mr. Shucklin: The mother actually got here in November, 1948.

The Court: When did the two elder brothers actually get here?

Mr. Shucklin: November, 1948.

The Court: All right. You may proceed.

Mr. Shucklin: I will call Mr. Yee Don Found.

The Court: Do you have any opening statement, Mr. Dennis, at this time?

Mr. Dennis: No, your Honor. Those are our [3] contentions.

YEE DON FOUND

a witness produced on behalf of plaintiff, being first duly sworn, testified on oath as follows:

Direct Examination

By Mr. Shucklin:

Q. Will you please tell us your name?

A. Yee Don Found.

Q. Where do you reside, Mr. Yee?

A. 517 7th Avenue South.

(Testimony of Yee Don Found.)

The Court: What city?

The Witness: Seattle.

Q. Who resides there with you?

A. My wife and the children.

Q. All right. What is your wife's name?

A. Yee Shee.

Q. Is she in the courtroom at this time?

A. Yes.

Q. The lady in the blue coat? A. Yes.

Q. And who else resides there with you?

A. Yee Chuck Ming.

Q. And who is he?

A. That is my son. [4]

Q. And is he the son of Yee Shee also?

A. Yes.

Q. Is he in the courtroom? A. Yes.

Q. Would you please point him out?

A. The one on that seat there (indicating spectator), standing up now.

Q. The boy standing up? A. Yes.

Q. Who else? A. Yee Chuck You.

Q. Yee Chuck You. And the "You" is spelled "Y-o-u"? A. Yes.

Q. Is he in the courtroom? A. Yes.

Q. Where is he?

A. The one standing up now.

Q. And who else? A. Yee King Gee.

Q. And is he in the courtroom? A. Yes.

Q. Would you point him out?

A. Yes, the smallest boy.

(Testimony of Yee Don Found.)

Q. Now, what is your business?

A. Grocery store and meat market. [5]

Q. And where is that place of business?

A. 400 Aurora Avenue, Seattle.

Q. Are you an American citizen? A. Yes.

Q. Where were you born?

A. I was born in China.

Q. And where in China?

A. Suey Lung Village.

Q. How do you spell Suey? A. S-u-e-y.

Q. And I notice in Immigration records it is also spelled Thuey, T-h-u-e-y Lung?

The Court: Suey Lung Village?

Mr. Shucklin: Yes, your Honor.

Q. And what date was that?

A. September 14, 1913.

Q. Was your father a citizen of the United States? A. Yes.

Q. And what is his name?

A. Yee Wing Haw.

Q. Yee Wing Haw, is that right? A. Yes.

Q. When did you first enter the United States?

A. In August, 1929.

Q. Well, do you remember the date? Was it approximately [6] August 6th?

A. August 6th, yes.

Q. What was your route from China to the United States? Through Canada, I believe?

A. Through Canada, yes.

(Testimony of Yee Don Found.)

Q. You entered the western part of Canada at Vancouver?

A. Yes, we landed in Vancouver, and took the train across Canada to Boston.

Q. You finally entered at Boston?

A. Yes, finally entered at Boston.

Q. Was your father residing at Boston at that time? A. Yes.

Q. And what was the address in Boston?

A. 51 Harvard Street.

Q. What did you do after you came to this country? A. Go to school.

Q. Was it your intention to make the United States your home at that time? A. Yes, sir.

Q. Has that been your intention since that time?

A. Yes, sir.

Q. Now, did you work while you were in Boston the first time?

A. No, I was not actually working.

Q. Just going to school? [7]

A. Just going to school.

Q. Then what did you do?

A. Then my father and I went to Santa Barbara, California.

Q. And about what year was that?

A. That was around 1930.

Q. And what did you do in Santa Barbara?

A. Oh, I go to school, and I also work part time in a restaurant.

(Testimony of Yee Don Found.)

Q. Did you acquire an interest in the restaurant later? A. Yes.

Q. What was that interest?

A. I owned \$500 of the business.

Q. You paid in \$500? A. Yes.

Q. And what interest did you have in it? I mean, what fraction?

A. Well, it was about one-fifth of the business.

Q. How long did you stay in Santa Barbara?

A. Oh, I think about four years.

Q. Did you maintain an address any place?

A. 51 Harvard Street.

The Court: What city?

The Witness: Boston.

Q. Was that during the time you were in Santa Barbara also? [8] A. Yes, sir.

Q. Then what did you do?

A. Then I go back to Boston and live at 51 Harvard Street.

Q. Was your father with you, too?

A. Yes.

Q. Did you work in Boston?

A. Yes, I work; not regular; just part-time.

Q. What was your permanent residence after coming to the United States.

A. The United States.

Q. United States? A. Yes.

Q. Was that your intention when you left China?

A. Yes, that is what I intended to do when I left.

(Testimony of Yee Don Found.)

Q. To have your permanent residence in the United States? A. Yes, sir.

Q. And did you ever change that intention?

A. No.

Q. You always regarded the United States as your residence? A. Yes, sir.

Q. Your permanent residence?

A. Yes, sir.

Q. Now, in 1936, what did you do?

A. Then I went to China. [9]

Q. And what was the purpose of your trip?

A. Oh, to see my mother and the rest of the family.

Q. What was your intention when you left the United States then? To come back?

A. Yes, I intended to come back in a short while.

Q. Was that visit that you made temporary or permanent? A. Temporary.

Q. Did you get a certificate of identity at that time? A. Yes, I got a certificate.

Q. Pardon me? A. Yes, I got a certificate.

Q. Now, what happened after you got back to China? A. I married.

Q. And whom did you marry?

A. Yee Shee.

Q. And she is your present wife? A. Yes.

Q. Did you have any conversation with her about where you were going to live after your marriage?

A. Yes, I believe so.

Mr. Dennis: Just a minute. I object to that.

(Testimony of Yee Don Found.)

Q. Well, what was your intention about your home after you got married?

A. To live in United States. [10]

Q. What were you going to do about your wife?

A. I hoped that some day the law would allow her to come and live with me in the United States.

Q. At that time you could not bring her in?

A. No.

Q. Now, when you were in China, did you work?

A. No.

Q. Were there any children born at the time of your first visit? A. Yes.

Q. When were you married? Do you remember the American date?

A. Yes, November 29, 1936.

Q. Now, was there a child born while you were there? A. Yes.

Q. And what was the child's name?

A. Yee Chuck Ming.

Q. That is the boy that you pointed out?

A. Yes.

The Court: Yee Chuck Ming?

The Witness: Yee Chuck Ming.

Q. When was he born?

A. November 10, 1937.

Q. Do you remember the CR date?

A. The CR date? Let me see. [11]

Q. The Chinese Republic date.

A. Yes, the CR date is CR 26—, 10th month and 8th day.

(Testimony of Yee Don Found.)

The Court: CR 26, 10th month and 8th day?

The Witness: Yes.

Q. Now, when did you return to the United States?

A. I returned to the United States in the early part of August, 1938.

Q. Now, when you returned to the United States,—at that time where was it your intention to go?

A. I intended to go back to Boston, Massachusetts.

Q. Did you have an address there,—a residence there? A. Yes, 51 Harvard Street.

Q. Had you paid any rent on that place?

A. Yes.

Q. Beginning when?

A. Beginning in 1929.

Q. You mean right up to the time that you went back to the United States, is that correct?

A. Yes.

Q. And did you pay rent while you were in Santa Barbara too? A. Yes.

Q. You did? A. Yes.

Q. Now, what port did you enter in 1938? [12]

A. Seattle, Washington.

Q. Now, was there anything that changed your plan then?

A. Oh, because my uncle was in Seattle, and so I stayed in Seattle.

Q. And at what address?

(Testimony of Yee Don Found.)

A. 517 7th Avenue South, Seattle.

Q. Is that where you are now? A. Yes.

Q. Now, was there any other child born after your return to the United States? A. Yes.

Q. And his name is what?

A. Yee Chuck You.

The Court: Yee Chuck You?

The Witness: Yee Chuck You, yes.

Q. And when was he born?

A. January 26, 1939.

Q. Do you remember the CR date of that?

A. CR 27, the 12th month, and the 7th day.

Q. Now, had you formed any intention about bringing your children to the United States?

A. Yes.

Q. And what was your intention?

A. Well, I intended to take the children to the United States to live with me. [13]

Q. Had you determined at what age or anything?

A. Well, I expected them to be around ten years old.

Q. And why ten?

A. Well, because they are too small without their mother's care. I could not bear to bring them over before.

Q. After you returned or came to the United States at that time, where did you go?

A. I stayed in Seattle for a little while, and then went to Marshfield, Oregon.

Q. Marshfield, Oregon?

(Testimony of Yee Don Found.)

A. Marshfield, Oregon. I worked in the kitchen of the Chandler Hotel.

The Court: What hotel?

The Witness: Chandler Hotel.

Q. How long did you work there?

A. About eight months.

Q. And where did you work after that?

A. Then I went to China on a visit again.

Q. About when was that?

A. I left Seattle January 6, 1940.

Q. Now, what was your intention about the United States at the time you left that time?

A. I intended to come back to the United States.

Q. And where was your residence at that time?

A. 517 7th Avenue South, Seattle, Washington.

Q. Did you keep that residence although you went down to Marshfield to work?

A. Yes, because I put all my personal property there.

Q. At 517 7th Avenue South?

A. 517 7th Avenue South.

Q. Now, did you work when you went back to China? A. No, sir.

Q. And at whose home was your wife and children? A. My parents' house.

Q. In Suey Lung Village?

A. In Suey Lung Village.

Q. Did you work in China, then?

A. No, sir.

Q. Now, was there another child born after you went to China? A. Yes.

(Testimony of Yee Don Found.)

Q. And who is that child?

A. Yee King Gee.

Q. And will you point him out?

A. Right in the middle; the small one (indicating child on spectators' bench).

Q. And when was he born?

A. He was born March 16, 1941.

Q. And what was the CR date? [15]

A. CR 30, 2nd month, and the 19th day.

Q. When did you return to the United States?

A. August 28, 1941.

Q. Was that in Seattle?

A. San Francisco.

Q. San Francisco?

A. And then I came back to Seattle.

Q. You mean the port you entered was San Francisco?

A. Yes, the port was San Francisco.

Q. Did you come back to Seattle? A. Yes.

Q. When you left the United States in 1940, did you have a citizen's return certificate?

A. Yes.

Q. When you came to Seattle in 1941, where did you live?

A. 517 7th Avenue South, Seattle, Washington.

Q. Now, after King was born,—after Yee King Gee was born, what was your intention about bringing your sons to the United States?

A. Yes, when they grow up a little bit bigger.

Q. You were going to do what?

(Testimony of Yee Don Found.)

A. I was going to bring them to the United States to live with me.

Q. Did you discuss it with your wife?

A. Yes, I told her about it. [16]

Mr. Dennis: Just a moment. I object to any conversation with his wife.

The Court: Just a moment, Counsel. I am somewhat of the opinion that in connection with determining intent that an individual's statement as to discussing intent as to children with his wife is admissible. I am not saying the Court should or should not give very much weight to the testimony.

Mr. Dennis: Conversation between husband and wife?

The Court: I am of the opinion that in connection with intention that a witness should have the right to say what discussion he had, and it is permitted for him to say his intention was to do a certain thing. I will concede that from a practical standpoint it is very difficult to rebut such, but I will let Counsel know that, personally, I have no objection to testimony by a witness touching upon his conversation with his wife in connection with intent.

Now, I am not compelling petitioner or plaintiff's counsel to run such risk as there may be in my ruling, and if plaintiff's counsel would rather submit to defendant's objection, he may.

What do you want me to do, Mr. Shucklin? [17]

Mr. Shucklin: I think he has a right to show he discussed his intention with his wife.

(Testimony of Yee Don Found.)

Mr. Dennis: I haven't objected to that question. I objected to any conversations between himself and his wife. That is what I objected to, conversation between husband and wife.

The Court: You are objecting to his saying that he conveyed that intention to his wife?

Mr. Dennis: No, that was not the question.

The Court: All right.

Mr. Dennis: He was asked if he discussed the question with his wife, and he said he did, and I object to anything further between husband and wife.

The Court: Then the particular question put you are not objecting to?

It was the answer——

Mr. Dennis: It was the answer he was giving I was objecting to. I did not object when he said he had a conversation, but I object to the conversation.

The Court: All right. I will sustain the objection to further than that.

Q. Did you discuss your intention to bring your children to the United States with your wife? [18]

A. Yes——

Q. Now, that is all you can say. After you came to Seattle, was there another child born?

A. Yes.

Q. And the name of the child?

A. Yee Suey Jin.

Q. Was that a daughter? A. A daughter.

Q. And when was she born?

(Testimony of Yee Don Found.)

A. She was born March 2, 1942.

Q. What was the CR number on that?

A. CR 31, the 2nd month and the 5th day.

Q. Did she die? A. She died, yes.

Q. What was the date of her death?

A. The date?

Q. The American date?

A. The American date was some time in July. I don't know the exact date on that; in 1947.

Q. In 1947. Do you know what the CR number was?

A. The CR was CR 36, the 6th month, 1st day.

The Court: CR 36, 6th month, first day?

The Witness: Yes.

Q. 36-6-1, is that it? A. Yes. [19]

Q. Now, after you returned to Seattle, what did you do?

A. I worked in the Hollywood Poultry Farm at Woodinville.

Q. Did you return to 517 7th Avenue South?

A. Yes, 517 7th Avenue South, Seattle.

Q. Did you still maintain that as your residence?

A. Yes.

Q. Then, after you left the Hollywood Poultry Farm, what did you do?

A. Then I worked a short time in the China Pheasant in Seattle as a waiter.

The Court: After leaving the Hollywood Poultry Farm, where did you work?

The Witness: In the China Pheasant restaurant.

(Testimony of Yee Don Found.)

Q. As a waiter? A. As a waiter.

Q. How long did you stay there?

A. A very short while.

Q. Then what did you do?

A. When the war broke out, I worked in the Seattle-Tacoma Shipyard, Plant B, as a metal mechanic.

Q. How long did you work there?

A. Oh, all the—approximately three years.

Q. During that time did you establish a business, too? A. Yes, at 400 Aurora Avenue. [20]

Q. What is that place called?

A. Central Market.

Q. Do you remember about what year you established that?

A. I believe it was some time in May, 1944.

Q. Do you still have that place?

A. I still have that place.

Q. Now, after that time, did you try to do anything about bringing your family to the United States? A. Yes.

Q. When was that? When did you start?

A. I started right after the war is over.

Q. And what steps did you take?

A. I made at that time affidavit for the children and wife to come over.

Q. An affidavit for the children and the wife?

A. Yes.

Q. Now, your wife was allowed to come in after that time?

(Testimony of Yee Don Found.)

A. Well, at that time, not exactly, but we were waiting and planning at that time that when the law was changed we planned to bring the children and the wife over if the wife was allowed.

Q. But if the wife was not allowed, were you going to bring the children?

A. We would bring the children.

Q. Were you going over there for them, or were you going [21] to——

A. I did not plan to go back to bring them over.

Q. They were going to come over by themselves?

A. Yes, that is what we planned; what I planned.

Q. You planned that? A. Yes.

Q. Then what happened?

A. When Yee King Gee was refused by the Consul General in Canton City, it was very upsetting to my wife, and so she was worried because the boy was not coming, and I am afraid on account of that it would be upsetting to my wife and make her worry, because the boy could not come with her. So I went to China.

Q. You said “upset”?

A. Yes, make her worry.

Q. Okay. So then what did you do?

A. Then I went to China to try to do what I could, to talk to the Consul General in Canton City and also to comfort the wife so she will not be worried so much.

(Testimony of Yee Don Found.)

Q. Then did the Consul General tell you why he would not allow Yee King Gee to come?

A. Yes, he told me it was because I was not in the United States ten years before he was born.

Q. Yes. [22]

A. But I explained to him I stayed here more than eleven years, and I asked him what reason; and he told me that he has asked the State Department to give that decision.

Q. What happened then?

A. Then I couldn't wait, so I came with the wife and the two older boys and went to the United States on November 18, 1948.

Q. Did you have a passport?

A. Yes, I had my passport.

Q. And on November 18, 1948, who came to the United States then?

A. My wife and two older boys, older sons.

Q. That is Yee Chuck Ming and Yee Chuck You?

A. Yes.

Q. Where did you go to live?

A. 517 7th Avenue South.

Q. And that is where they are now?

A. Yes.

Q. Did Yee King Gee come to the United States later?

A. Later, yes.

Q. When was that? A. February 24, 1949.

Q. Where is he living now?

A. 517 7th Avenue South, Seattle. [23]

Q. What is Yee Chuck Ming doing now?

(Testimony of Yee Don Found.)

A. He is going to Warren Avenue School?

Q. Going to the Warren Avenue School?

A. Yes.

Q. And Yee Chuck You?

A. Also in the same school.

Q. And Yee King Gee?

A. The same school.

Q. In the Warren Avenue School?

A. Yes, Warren Avenue School.

Q. Do you still have the business at 400 Aurora Avenue? A. Yes.

Q. Did you purchase any property?

A. Yes, I buy a little property here.

Q. Is the property where the store is?

A. Yes.

Q. Any other property? A. No.

The Court: Counsel, I am going to declare a recess at this time, and it will be my plan to reconvene at one o'clock.

Is that going to interfere with anybody's plans too materially?

(No response.)

(Recess until 1:00 p.m.) [24]

Q. The store is at 400 Aurora Avenue?

A. Yes, and 402 and 404 and 710 Harrison.
That is what they call the property.

Q. They call the property that? A. Yes.

Q. When you came in 1941, did you register for the draft? A. Yes.

(Testimony of Yee Don Found.)

Q. And is Yee King Gee your son?

A. Yes.

Q. And is he the son of Yee Shee?

A. Yes, son of Yee Shee, too.

Q. And is Yee Chuck Ming your son?

A. Yes.

Q. And the son of Yee Shee? A. Yes.

Q. And is Yee Chuck You your son?

A. Yes.

Q. And the son of Yee Shee? A. Yes.

Q. And have you brought this action as the next friend of your son? A. Yes.

(Certificate of Identity marked Plaintiff's Exhibit 1 for identification.) [25]

Mr. Shucklin: Mr. Dennis says he has no objection to this, but I think I had better have it identified.

Q. Showing you Plaintiff's Exhibit 1 for identification, will you look at this?

A. (Witness does so.)

Q. Do you know what that is?

A. That is my citizenship paper.

Q. Is that the citizenship identification that you received when you first came to the country?

A. Yes.

Q. In what year? A. In 1929.

Mr. Shucklin: We offer this in evidence.

Mr. Dennis: No objection.

The Court: Exhibit 1 admitted.

(Testimony of Yee Don Found.)

(Document previously marked Plaintiff's Exhibit 1 for identification received in evidence.)

(Visitor's Permit No. 938,222 marked Plaintiff's Exhibit 2 for identification.)

Q. Showing you Plaintiff's Exhibit 2 for identification, do you know what that is? A. Yes.

Q. What is that? [26]

A. That is one my son got when he arrived in the United States.

Q. All right. Tell which son?

A. Yee King Gee. He received it from the Immigration office in San Francisco.

Q. And you kept it in your possession?

A. Yes.

Mr. Shucklin: I offer Plaintiff's Exhibit No. 2 for identification in evidence.

Mr. Dennis: No objection.

The Court: Exhibit 2 admitted.

(Document previously marked Plaintiff's Exhibit No. 2 for identification received in evidence.)

(Passport No. 127,792 marked Plaintiff's Exhibit No. 3 for identification.)

Q. When you last went to China, did you obtain a passport? A. Yes.

(Mr. Shucklin hands Plaintiff's Exhibit No. 3 for identification to Mr. Dennis.)

(Testimony of Yee Don Found.)

Mr. Dennis: I fail to see the materiality of this.

The Court: Are you objecting on the ground it is immaterial? [27]

Mr. Dennis: Yes, it is immaterial.

The Court: It has not been offered yet.

Mr. Shucklin: I have only had it marked for identification.

Mr. Dennis: No objection to the identification of it.

Q. Showing you plaintiff's Exhibit 3 for identification, will you state what that is, if you know?

A. It is my passport.

Q. Was that issued to you where?

A. In the United States.

Q. Where in the United States?

A. State Department.

Q. Where did you receive it?

A. 517 7th Avenue South.

Q. Where did it come from? How did it come to you? By mail? A. By mail.

Mr. Dennis: What was the date of it?

Mr. Shucklin: November 10, 1947.

We offer this in evidence.

The Court: Exhibit No. 3 is offered.

Mr. Dennis: I object on the ground that it is absolutely immaterial, a passport in 1947.

Mr. Shucklin: Passports are only issued to [28] citizens of the United States.

Mr. Dennis: Well, we don't deny he is a citizen of the United States.

(Testimony of Yee Don Found.)

The Court: Objection overruled. It is admitted for what it is worth.

(Passport previously marked Plaintiff's Exhibit 3 for identification received in evidence.)

(Documents marked Plaintiff's Exhibits 4 and 5 for identification.)

Mr. Shucklin: These are communications from the State Department, and I think Mr. Dennis has agreed they may go in.

Mr. Dennis: No objection.

The Court: Exhibits 4 and 5 are admitted, upon stipulation, I guess. Would that be it?

Mr. Dennis: Yes.

The Court: Exhibits 4 and 5 admitted on stipulation.

(Documents previously marked Plaintiff's Exhibits 4 and 5 for identification received in evidence.)

Mr. Shucklin: Does your Honor wish to read these now?

The Court: Yes. [29]

(Court reads Plaintiff's Exhibits Nos. 4 and 5.)

The Court: You may proceed.

Mr. Shucklin: The Government has certain files in reference to Yee Don Found, and we understood at first the file was going to be put in, but I under-

(Testimony of Yee Don Found.)

stand now that if there are any documents in the Immigration file we wish offered we can read them into the record and make copies, is that correct?

Mr. Dennis: Yes. The code provides specifically for the introduction of Government records. These are Government records. I am perfectly willing that certified copies be presented to the Court, and not the original records. That is specifically provided for in the code. I am perfectly willing to read anything you wish into the record, and later offer photostatic copies without the necessity of their being certified.

The Court: It is not going to be very helpful to me if you just read it.

Mr. Shucklin: There was a misunderstanding, because we understood from Mr. Belcher that he was going to put the file in as part of the Government's case.

Mr. Dennis: I have no objection to their being lodged with the Clerk, but not as part of the [30] record. You can read them to the Court.

The Court: Why not lodge them with the Clerk and specify those particular pages that you want me to consider as being in evidence, and then you may supply photostats of same for the record. Is there any reason you can't do that?

Mr. Shucklin: The only difficulty is taking them out of the custody of the Clerk. There may be a question about that. I don't know.

(Discussion between Court and Counsel.)

(Testimony of Yee Don Found.)

The Court: I will provide for your being allowed to photograph what you want in. I wish the record to show clearly the designation of what you are putting in, because I do not want to make my ruling on the basis of testimony that is not in evidence.

Mr. Shucklin: Very well. I will now refer to office memorandum from District Director, Boston, Massachusetts, to District Director, Seattle, Washington, dated April 22, 1947, File 1200-20420 over 7030-11309.

(Mr. Shucklin reads from document referred to, photostatic copy of which was thereafter received in evidence as Plaintiff's Exhibit No. 6.)

Mr. Shucklin: The next document is [31] under the caption of Immigration and Naturalization Service, Seattle 4, Washington, Seattle File No. 120-20420 over 7030/11309. Report made at Seattle, Washington; date May 26, 1947, by John H. Kulander, Immigrant Inspector.

(Mr. Shucklin reads document, photostatic copy of which was thereafter received in evidence as Plaintiff's Exhibit No. 7.)

Mr. Shucklin: The next document is under the heading of United States Department of Labor, Immigration and Naturalization Service, Form 430—Application of Alleged American Citizen of the Chinese Race for Pre-Investigation of Status, dated December 29, 1939.

(Testimony of Yee Don Found.)

(Mr. Shucklin reads from document referred to, photostatic copy of which was thereafter received in evidence as Plaintiff's Exhibit No. 8.)

Q. Showing you document dated December 29, 1939, headed United States Department of Labor, Immigration and Naturalization Service, I will ask you to state if you have seen that document? Is that your signature?

(Showing document marked Plaintiff's Exhibit 8.) [32]

A. Yes.

Q. And in English? A. Yes.

Q. And is that your signature in Chinese?

A. Yes.

Q. And is that your photograph? A. Yes.

Mr. Shucklin: The next is an application of alleged American citizen of the Chinese race for pre-investigation of status, dated Boston, Massachusetts, dated July 23, 1936, with the same wording as the last exhibit.

(Mr. Shucklin reads from document photostatic copy of which was thereafter received in evidence as Plaintiff's Exhibit No. 9.)

Q. Now, showing you this document headed, "U. S. Department of Labor-Immigration and Naturalization Service, Boston, Massachusetts, July 23, 1936," I ask you to examine that document.

A. Yes.

(Testimony of Yee Don Found.)

Q. Did you sign this document? A. Yes.

Q. Is that your Chinese signature on there?

A. Yes. [33]

Q. And is this your signature in English, Yee Don Found? A. Yes.

Q. Is that your photograph? A. Yes.

Mr. Dennis: May it please the Court, I will object to this. It is getting back to the father of this citizen. I don't see any possible materiality or relevancy that it has with this case.

The Court: Why is that important?

Mr. Shucklin: This is the original application, your Honor, in which the father states he wishes to depart and re-enter through the Port of Boston.

The Court: As I understand it, the Government is not contesting the citizenship of Yee Don Found whatsoever; they are admitting he is an American citizen.

Mr. Dennis: No, there is no question of it.

The Court: All right. Then you are conceding his American citizenship?

Mr. Dennis: I am conceding this witness is an American citizen.

The Court: All right. [34]

Mr. Shucklin: You may cross-examine.

Cross-Examination

By Mr. Dennis:

Q. Now, then, your name is Yee Don Found, is that right? A. Yes.

(Testimony of Yee Don Found.)

Q. Now, Mr. Found, you left Boston August 21, 1936? A. That is correct.

Q. And returned on August 9, 1938?

A. Yes.

Q. And you left the United States on January 6, 1940? A. Yes.

Q. And you returned September 4, 1941?

A. Yes.

The Court: Just a minute. When did you return?

The Witness: Well, we were in San Francisco August 28, 1941.

Q. August 28, 1941? A. Yes.

Q. Now, you came to this country when?

A. In 1929.

Q. In 1929. That date was——

A. August 6, 1929.

Q. August 6, 1929? [35] A. Yes.

Q. The first time you left this country was when? A. August 21, 1936.

Q. That is right. And this boy of yours was born on what date?

A. You mean Yee King Gee?

Q. The boy in question?

A. He was born March 16, 1941.

Q. Now, this action that you have instituted here was started on the 10th day of March, 1948, is that correct? A. What we start?

Q. You started this action on March 10, 1948?

A. Yes, I guess, just about.

(Testimony of Yee Don Found.)

Mr. Dennis: May I see the original file to check the date?

Mr. Shucklin: Whatever the date shows.

The Witness: Yes, it must be—whatever the date shows.

Q. This action was started on March 10, 1948, was it not? A. Yes.

Q. On March 10, 1948, where was your wife?

A. In China.

Q. Your wife was in China. Where were your three [36] children? A. In China.

Q. Neither your wife nor any of your children had ever been to the United States, had they? They did not come to the United States until November of this year, was it, or December?

A. Last year.

Q. What? A. November, 1948.

Q. November, 1948. Now, when you came back from China the second time—I beg your pardon. The first time you went to live with your uncle, is that correct?

The Court: The first time?

Mr. Dennis: The first time.

A. You mean the first time? That means what year?

The Court: 1936.

Mr. Dennis: Withdraw the question.

Q. When was it that you first began to live with your uncle? A. 1938.

Q. Who else was living there in that house?

(Testimony of Yee Don Found.)

A. My uncle, and he usually had some cousins, too.

The Court: How many?

The Witness: Let me see. At that time [37] there was—well, the cousins came a little bit later, but not much later, though. They were still in China then, and they came around—a few months later. We all lived together in 517 7th Avenue South, Seattle. I think that he had three cousins, and they all came. One would come one time, and the others would come different times.

Q. Well, how many of you lived in that house?

A. Five.

Q. Is your uncle still living? A. Yes.

Q. How many live in that house at the present time?

A. He is in China now, temporarily.

Q. On March 10, 1948, how many people lived in that house?

A. Well, there were three regular, and occasionally he had some friends come in for a short while.

Q. Three regulars, and he had some others come in? A. Yes.

Q. Was this house owned by your uncle?

A. No.

Q. Did he rent it? A. We rented it.

Q. Your uncle was the first one that rented the house, is that correct? [38]

A. Yes, as far as I know.

Q. You did not rent it?

(Testimony of Yee Don Found.)

A. Well, I helped pay the rent because we lived there.

Q. Yes, but it was in his name, so far as the rent goes? A. Yes, I believe it was.

Q. Now, going back to the first time you came across, you came to Boston, Massachusetts, and the name of that street is Howard Street, or Harvard Street?

A. At that time I—you know how it is—I did not know how to spell very good.

Q. It is Hudson Street, as a matter of fact?

A. Hudson Street is not the place where I lived. Hudson Street is a store where I have my mail, and I always have it delivered to that store in case I am not in the house, and I may lose my letter or important documents. So I use Hudson Street for any important letter, to make sure somebody receive it and I would not lose it.

Q. Now, you went to live with your father back there, didn't you? A. Yes.

Q. You went to school? A. Yes.

Q. What school did you go to back there? [39]

A. I went to what we call a Union School at that time.

Q. How is that spelled?

A. I did not know much English at that time. We called it the Union. It must be Union.

Q. You did not work at that time?

A. No, I did not work at that time.

Q. When was it that you first started to work?

(Testimony of Yee Don Found.)

A. When I was in Santa Barbara; some time in 1930. I just worked part-time, of course.

Q. And when you say "part-time," what do you mean?

A. Part-time. In school day time, and work after school.

Q. You worked a little after school?

A. Yes.

Q. Before you went back to China?

A. Yes.

Q. How many years had you actually done any work outside of going to school?

A. Well, I actually done approximately around three years part-time work.

Q. But you hadn't at any time done anything except part-time work up until you went back to China? That is correct, isn't it?

A. That is right. I did not do steady work.

Q. In other words, you were getting an education in this country? [40]

A. That is right.

Q. You went back, then, to China. You say that you got a certificate of identity. Did you buy a round-trip ticket when you went to China?

A. I did not buy a round-trip ticket.

Q. You bought a one-way ticket, didn't you?

A. Yes.

Q. And when you were in China you married your present wife, is that correct? A. Yes.

Q. You knew at that time she could not come to the United States? A. That is right.

(Testimony of Yee Don Found.)

Q. And you left and returned to the United States afterwards? A. Yes.

Q. That was about the time the war started in China, wasn't it?

A. Well, not very far, before the war started in China, yes.

Q. Just about the time the war was fought in China? A. Yes.

Q. Then you went across on the second trip, and what children were born at that time?

A. The second time was Yee King Gee. [41]

Q. By the way, why don't they have your last name?

A. They have my last name because it is the custom that we always call the surname as the first. Yee is really our last name.

Q. In other words, that is the Chinese method, isn't it?

A. Right now, when we are in school or in business we always use the Yee as the last, for the reason that is the surname. The name is Yee Don Found.

Q. And in bringing this action you said Yee King Gee. You didn't say anything about Yee King Found?

A. No, Yee is the family name; I mean the surname.

Q. In other words, the children are named according to the Chinese custom, aren't they?

A. When we come here we do use Yee. That is what we write in school. In my business—you

(Testimony of Yee Don Found.)

can check up—I always use Yee as the last name, because when we live here, we use the regular American way.

Q. What is your name then?

A. Right now we call it Yee Don Found, but in my business or any association, we always call it Don Found Yee, or sometimes Don F. Yee. That is what I have been using in business.

The Court: Don Found Yee?

The Witness: Or Don F. Yee; sometimes [42] just use the middle initial.

Q. When you signed the papers, how did you sign the papers then?

A. Because I had to follow the name when I come here, I use that name all the time.

Q. The name isn't Yee Don Found. It is Don Found Yee, isn't it?

Mr. Shucklin: I object to that. The witness has already explained that in Chinese his last name is Yee. I think he is mixing up the witness.

The Court: This is cross-examination. Objection overruled. You may have redirect on it.

Q. Now, then, you said on direct examination that your father—by the way, is your father living now? A. My father and mother, yes.

Q. And your *mother* and mother are both in China, are they? A. Yes.

Q. And that is why your children and your wife were permitted to stay and were staying there until last November? A. Yes.

(Testimony of Yee Don Found.)

Q. When did you stop paying rent on that apartment in Boston? [43]

A. When did I stop?

Q. Yes.

A. When I decided to live with my uncle at 517 7th Avenue, then I stopped because I still during that time have some bedding or some personal belongings in that house.

Q. Where was your father at that time?

A. My father was remaining in China because he is not in very good health.

Q. Did *you* father go to China the same time you did? A. 1936.

Q. So you and your father both went back to China in 1936, that is correct, is it?

A. That is right.

Q. And your father remained there, and your mother remained there? A. Yes.

Q. And you came back? A. I came back.

Q. Had you paid any rent on that Boston apartment prior to the time you went——

A. I paid up to the time I decided to live with my uncle.

Q. How much rent did you personally pay?

A. We—— [44]

Q. I am not talking about “we.” I am talking about you.

A. Myself. You see—we paid—I am sorry. I am thinking of my father, too. You see my father paid rent, too; about \$25.00 a year.

Q. What did you have? A room there?

(Testimony of Yee Don Found.)

A. We had two-room apartment.

Q. You had a two-room apartment, and the rental of that was how much?

A. I paid \$25.00; approximately \$25.00 a year.

Q. And when did you stop paying it?

A. I stopped about 1938.

Q. Who lived in that apartment while you were over in China?

A. I had some friend living there.

Q. Your friend lived there while you were in China, and you never went back there?

A. I was intending coming back there when I came back until I seen the uncle in Seattle. So I settled down in Seattle and did not go back to Boston.

Q. How did you send this \$25.00 to Boston, when you were in China?

A. I was paying in advance before I went home.

Q. How much did you pay in advance?

A. I gave the people who rented that place—I forget how much money, but I think around \$50.00.

Q. As a matter of fact, these people that were in that place paid the rent while you were in China, didn't they?

A. They paid some, too.

Mr. Dennis: That is all.

Redirect Examination

By Mr. Shucklin:

Q. What is your family name? A. Yee.

Q. Y-e-e? A. Y-e-e.

Q. What is Yee King Gee's family name?

(Testimony of Yee Don Found.)

A. Yee.

Q. What is the custom in China about the family name, whether it is the first or last?

A. Yee; that is the family name.

Q. In China does the family name come first?

A. Yes.

Q. And that is the way it is in this action?

A. That is right.

(Witness excused.) [46]

CHARLES WAH

sworn as interpreter.

Mr. Shucklin: I will call Yee King Gee.

Mr. Dennis: We will waive the oath as far as the boy is concerned. There is no reason to swear him.

The Court: All right.

YEE KING GEE

a witness produced in his own behalf as the plaintiff, testified as follows:

Direct Examination

By Mr. Shucklin:

Q. Will you please state your name?

A. Yee King Gee.

Q. Where do you live?

A. 517 7th Avenue South, Seattle.

Q. Who else lives there with you?

(Testimony of Yee King Gee.)

A. My father and my mother and my two older brothers.

Q. Do you see your father in the courtroom?

A. Yes.

Q. Point to him.

A. (Witness points to Yee Don Found.)

Q. Do you see your mother here? A. Yes.

Q. Point her out.

A. (Witness points to Chinese woman.)

Q. Do you see your older brothers?

A. Yes.

Q. Are they in the courtroom? A. Yes.

Q. What are their names?

A. The older brother is Yee Chuck Ming, and Yee Chuck You.

Q. Do you go to school? A. Yes.

Q. Where do you go to school?

A. I do not know the name of the school.

Q. Is it the Warren Avenue School?

A. Yes.

Mr. Shucklin: You may examine.

Mr. Dennis: No questions.

(Witness excused.)

YEE SHEE

a witness produced on behalf of plaintiff, being first duly sworn through the interpreter, testified on oath as follows:

Direct Examination

By Mr. Shucklin:

Q. Will you please state your name? [48]

A. Yee Shee.

Q. Where do you live?

A. 517 7th Avenue South, Seattle.

Q. Are you married? A. Yes.

Q. What is the name of your husband?

A. Yee Don Found.

Q. Do you have a family? A. Yes.

Q. Of what does the family consist?

A. My husband, my three sons, and myself.

Q. Do they live with at the same place you live?

A. Yes.

Q. What are the names of your children?

A. The first son is Yee Chuck Ming; the second son is Yee Chuck You; and the third son is Yee King Gee.

Q. Who is the father of each of the children?

A. Yee Don Found.

Q. When were you married?

A. CR 25-10—I think the 16th day.

Q. Where were you married?

A. At Suey Lung Village.

Q. At the time of your marriage, did you know

(Testimony of Yee Shee.)

that your husband, Yee Don Found, was an American citizen? [49] A. Yes, I did.

Q. What, if anything, did he tell you concerning his return to the United States?

Mr. Dennis: I object to that, may it please the Court, on the ground that it is conversation between husband and wife, and it is not admissible.

The Court: Well, just a minute——

Mr. Shucklin: I will ask the husband if he consents.

The Court: All right. You may ask that first.

Mr. Shucklin: Yee Don Found, do you consent that your wife testify concerning the conversation with you?

Mr. Yee Don Found: Yes.

Mr. Shucklin: Do you agree she can tell what you told her?

Mr. Yee Don Found: Yes.

The Court: All right. Any objection now?

Mr. Dennis: Yes, I object to it as immaterial.

The Court: Your opinion is that a conversation between husband and wife can't be put in with the consent of either? [50]

Mr. Dennis: That is my contention.

The Court: In any case?

Mr. Dennis: No, a case between the husband and wife, or where the wife or husband has received a criminal——

The Court: Well, is it your position that the husband never can produce a wife as a witness?

(Testimony of Yee Shee.)

Mr. Dennis: He can produce her as a witness, but not to testify to a conversation between the two.

The Court: Even where they consent?

Mr. Dennis: Yes.

The Court: Have you any decisions supporting that position?

Mr. Dennis: Not with me.

The Court: I will allow you to make an offer of proof under oath. This will be considered as an offer of proof. I will hear her, and if I come to the conclusion that Mr. Dennis is right, I can disregard it. If I come to the conclusion his objection is not well taken, I then will have it before me. It will be understood now that you are under an offer of proof until you make clear that you have stepped away from the offer of proof. All right; you may answer the question. [51]

(The question read.)

A. After we were married, he planned to return to the United States within a short period, but as soon as the law is permissible, he shall apply for my admission to the United States.

Mr. Shucklin: That is the end of the offer.

Q. Where did you stay after your marriage?

A. I lived at Suey Lung Village in my husband's parents' house.

Q. When was Yee Chuck Ming born?

A. CR 26-10-8th day.

Q. When was Yee Chuck You born?

(Testimony of Yee Shee.)

A. CR-27-12-7th day.

Q. When was Yee King Gee born?

A. CR-30-2-12th day.

Q. Was there a daughter born to you and your husband? A. Yes.

Q. What was the daughter's name?

A. Yee Suey Jin.

Q. When was Yee Suey Jin born?

A. CR-31-2-5.

Q. Is Yee Suey Jin still living? A. No.

Q. When did she die? [52]

A. She died CR-36-6-1.

Q. Was it your intention to come to the United States when you had the opportunity to do so?

A. Yes.

Q. On the visits that your husband made to China, did he work while he was in China?

A. No.

Q. What was your intention about sending your children to the United States?

A. My intention was to come with them to the United States.

Mr. Shucklin: You may cross-examine.

Cross-Examination

By Mr. Dennis:

Q. When you came to the United States, where did you go to live?

A. 517 7th Avenue South, Seattle.

Q. Who was living there at that time?

A. My husband and my two sons.

(Testimony of Yee Shee.)

Q. Was the house vacant when you went there, or was there anybody else living there?

A. The house had someone living there.

Q. And who was it who lived there?

A. A fellow by the name of Tang Buck. [53]

Q. Did your husband's uncle live there?

A. No, he is not there.

Q. Didn't he live there when you came there? When you came first, didn't your husband's uncle live there? A. No.

Q. Just this fellow named Chuck?

A. Tang Buck.

Q. Just this fellow named Tang Buck. Was that the only one? A. Yes.

Q. And no one else lives there but you folks at the present time? A. Yes.

Redirect Examination

By Mr. Shucklin:

Q. Was your husband's uncle in China at the time you arrived in Seattle? A. Yes.

Mr. Shucklin: That is all.

Recross-Examination

By Mr. Dennis:

Q. And is he still in China? A. Yes. [54]

Q. When did he go back to China?

A. Around August, 1938, he went to China.

Q. The same time your husband did?

A. No.

Mr. Dennis: That is all.

(Testimony of Yee Shee.)

Redirect Examination

By Mr. Shucklin:

Q. Do you know whether he is going to return to Seattle? A. Yes.

Q. Do you know the reason for the delay in returning?

A. He is waiting to bring his son over.

Recross-Examination

By Mr. Dennis:

Q. He has been over there since 1938? Is that what you said? A. Yes.

Q. He has never been back here since?

A. No.

Q. And your husband's father went over what year? A. About CR-25-8——

The Court: What? CR-25——

The Witness: CR-25-8.

Q. What year is that? A. 1936. [55]

Q. And he has never come back? A. No.

Q. Did your husband's uncle live with you in China? A. No.

Q. Did you pay any expenses over in China?

A. My wife gave me the money and I ran the budget.

Mr. Shucklin: The wife?

The Witness: I mean my husband.

Q. As a matter of fact, your husband's father paid the expenses over there, didn't he?

A. No.

(Testimony of Yee Shee.)

Q. How much did your husband send you over there?

A. He sent several times, but I don't remember the exact amount a year.

Q. What do you mean by several times? One, two, three or four?

A. About four times a year.

Mr. Dennis: That is all.

Mr. Shucklin: That is all.

(Witness excused.)

Mr. Shucklin: We rest.

Mr. Dennis. Defendant rests.

The Court: Plaintiff rests and Defendant rests.
All right. [56]

How much time do you wish for argument?

(Discussion between Court and Counsel as to time for argument.)

The Court: Well, Counsel, there are two questions in this case as I understand it.

One is whether the statute requires physical presence in the United States——

Mr. Shucklin: That is right.

The Court: ——or whether residence for ten years permits his having been in China approaching a year and eight months thereof.

Mr. Shucklin: It may be a little more than that; whatever it is, yes.

The Court: And the other question is whether or not this action was properly brought at the time

it was started in this jurisdiction, or whether it should have been instituted in the District of Columbia.

Mr. Shucklin: Those are the two questions involved in this particular case.

The Court: Without limiting the defense, it would seem to me from what has transpired during this trial and from the memorandum of the defense as well as that of the plaintiff, that those are the issues. [57]

Mr. Dennis: Those are the only issues in the case.

(Argument by Counsel.)

The Court: I am going to speak off the record a moment.

(Discussion off the record.)

The Court: As I have indicated to Counsel informally, without ruling on the question at all, I think there is a serious question as to whether this action should have been brought in this jurisdiction or in the District of Columbia.

I am told by Counsel that insofar as they have been able to discover, there has been no court decision on this question. If that be correct, and there has been no court decision, this, of course, is a question of first impression here. I would like respective counsel to give me as much assistance as they can properly on that issue, and I will also welcome as much further argument as they wish to present on the question of whether or not the

father has had the ten years' residence required by the statute.

(Court fixes time for submission of briefs.)

The Court: The Court hereby notifies the Clerk and authorizes the Clerk to permit Mr. Shucklin to take so much of the record in the file of the Immigration and Naturalization Service now or at such later time within the three weeks' period as he desires for the purpose of having such portions photographed. It is my understanding Mr. Dennis so agrees. Is that right?

Mr. Dennis: Yes, your Honor.

The Court: This hearing and trial is adjourned with the provision for briefs as previously stated this afternoon. [59]

August 25, 1949

Black, J.

COURT'S ORAL DECISION

The Court: The cause of Yee King Gee by Yee Don Found as his next friend, plaintiff, versus Dean Acheson, Secretary of State of the United States, defendant, has been submitted to the Court upon brief having been filed July 28, 1949. The plaintiff, who was the age of six years at the time he instituted the action on January 16, 1948, seeks a decree of this Court declaring him to be a national of the United States.

This action is brought by plaintiff under the authority of Section 903, Title 8, U.S.C.A. The

plaintiff contends that he is the son of an American citizen, and contends that his father at the time of plaintiff's birth resided within the United States more than ten years as required by Section 601, Title 8, U.S.C.A. The plaintiff Yee King Gee was born in China, under the allegations of the complaint, on March 16, 1941, it being alleged that the father was an American citizen and that the mother was a resident and citizen of China.

The defendant has answered contending that in any event under the provisions of Section 903, Title 8, U.S.C.A., that no court other than the District Court of the United States for the District of Columbia has jurisdiction of the matter. The defendant further contends [60] that aside from the question of jurisdiction plaintiff's father at the time of plaintiff's birth had not resided in the United States for ten years as required by Section 601 but only for a period of eight years and some months.

After the institution of the action a certificate of identity was obtained by plaintiff after an appeal permitting him to come personally to the United States until a decision might be rendered in this action.

Since the commencement of the action plaintiff's mother and two older brothers, born before 1940, have come to the United States and are now living in Seattle with Yee Don Found, the father.

Three interesting statutes are involved in the admission of the father originally as a citizen of the

United States and the admission of the two sons born before 1940 and in the contention of the government that the plaintiff, born after 1940, should be excluded.

The law in effect when the father was admitted declared that foreign born children of United States citizens were citizens of the United States at birth. By the time the two older brothers of this plaintiff came upon this earth the law had been changed to provide that children should derive citizenship at birth where born outside of the United States through either parent who was a citizen of the United States, but that such children [61] must arrive in the United States prior to becoming thirteen years of age and must remain five years, or until their eighteenth birthday. In 1940 the law was changed to provide that one of the parents must be a citizen of the United States or a resident of the United States for ten years prior to the birth of the child.

Unquestionably, the father is a citizen of the United States and entitled to remain here. It appears without question that the two older sons are citizens of the United States and entitled to remain here providing they continue to live here the prescribed period. By the law enacted, as I remember it, in 1946 the mother is entitled to admission and to remain.

If the Court were to be guided solely by sentiment, certainly, there would be sufficient tug at the heart strings to decide this issue in plaintiff's favor without delay or question.

Where a statute is plain the Court has but one rightful authority and only one duty. That authority and that duty are to accept and follow the law regardless of how differently the Court might wish the statute to have been worded and regardless of what the law would have been had the judge been a legislator with the deciding vote. Certainly, with a matter as important and precious as citizenship the Court should interpret the [62] law as it is. To allow sentiment in a case to influence the interpretation would ultimately work great injury by reason of an erroneous precedent. My problem, therefore, has been to reach that conclusion that is called for by the statute Congress passed.

In Section 903, Title 8, U.S.C.A., we find this language:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. . . .”

This section also provides for a certificate of identity for temporary admission to the United

States after the institution of an action providing his claim of nationality presented in such action "is made in good faith and has a substantial basis."

In Section 601 of Title 8, U.S.C.A., there is found this language:

"The following shall be nationals and citizens of the United States at birth: * * *

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: Provided, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease."

The plaintiff's father came to the United States in 1929. In 1936 he left the United States with authority and went to China, where he married. A few days less than two years after his departure he returned to the United States. Early in 1940 he left

the United States again with authority. He returned to the United States in 1941, approximately twenty months after leaving the United States in 1940. Arithmetical computation will disclose that his physical presence in the United States prior to his son's birth in 1941 was about eight years and four months.

The action is brought against the Secretary of State because the American Consul General at Canton, China, refused to recognize the American nationality of plaintiff and refused to allow him to come to the United States as a national of this country either with his father or otherwise.

The United States in its brief says this:

“The answer of the Secretary of State raises no serious question of fact, but the defense is purely a legal question. At the outset the jurisdiction is challenged. In the event this court determines it has jurisdiction, then on the merits we submit the following: * * * So that the total number of years the father was a resident of the United States prior to the alleged birth of his son, the plaintiff, was eight years and four months. * * * The period which persons should live in the United States and be associated with the American manner of life was set by Congress at ten years and not eight years and four months, * * * It appears clear that Congress did not contemplate constructive residence as sufficient under this section of the law since this would in effect defeat the very purpose of the restriction.”

If this court is the wrong court under the statute,

this present action should be dismissed. The law says the action may be instituted in the District Court for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence. The statute does not require that the plaintiff bring the action in such district in which he actually has a permanent residence.

This infant child can only make a claim of his residence through his next friend. His next friend, residing in the United States, as the act of the plaintiff claims that Seattle in this Western District of Washington is the permanent residence of the plaintiff.

The plaintiff submits many authorities to the effect that the domicile and residence of the father is the residence of the infant child regardless of where that child may be. There are many expressions of many courts and many text writers which seem to support such position of plaintiff's counsel and therefore of plaintiff.

It is unnecessary to determine whether actually the domicile and residence of the plaintiff from the date of his birth in China was at the residence of his father in the United States. In any event there is sufficient reason for the plaintiff's claim that Seattle is his permanent residence to give this court jurisdiction.

Unquestionably, the claim of the plaintiff through his father as next friend is made in good faith and with substantial basis.

This court has jurisdiction. The defendant does

not dispute the jurisdiction of either this court or the District Court of Columbia to consider this matter under section 903.

Aside from that, it is my recollection that in the case of *Chin Wing Dong versus Clark*, 76 Federal Supplement 648, I personally held that section 903 authorized such a proceeding as this and in a proper case the relief here sought. That former decision is at least persuasive to me.

In one of the earliest decisions reported interpreting congressional legislation applying to Chinese the court in the matter of *Chung Toy Ho and Wong Choy Sin*, 42 Federal 398, stated with reference to the admissibility of wives and children of Chinese merchants that "it ought not to be lightly, or without cogent reason, concluded that Congress, in the passage of the Act of 1884" intended to exclude the wives and children. And in such connection the court then states:

"It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children."

In *United States versus Rockteschell*, 208 Federal 530, Judge Dietrich speaking for the then Ninth Circuit Court of Appeals, held in substance the following:

"There is nothing in the naturalization act, other than the phrase itself, 'has resided continuously within the United States' to indicate a purpose upon the part of Congress to require continuous physical presence, and in the practical administration of the

law such a construction would entail consequences harsh in the extreme. Within reasonable limits, therefore, it is a question of fact, to be determined in the light of all the attendant circumstances of each particular case, whether the continuity of residence has been broken by temporary absences."

In *United States ex rel Devenuto versus Curran*, Immigration Commissioner, 299 Federal 206, in a decision of the Circuit Court of Appeals for the Second Circuit, it was pointed out that Congress in various statutes had used the terms "residences" and "domicile" and "continuous residence" and particularly commented that if Congress had meant that an alien must remain actually in the territory of the United States uninterruptedly during a specified period, that it should have used language like that of the Act of March 3, 1813, which had this provision:

"For the continued term of five years preceding his admission as aforesaid have resided within the United States without being at any time during the said five years out of the territory of the United States."

Plaintiff's father came to the United States in 1929. Except for an authorized departure from the United States, his residence continued to be in the United States until 1940 in January, when he again went to China. In the light of the language which Congress has used when it clearly wished to prevent any departure and in view of the fact that no such language or similar language was employed in this act, I must hold that the plaintiff's father by 1940

had had a residence in the United States of more than ten years. His departure in 1940 was in good faith and with the permission of the authorities of this country. He returned to the United States within a proper time. Under the statute, the plaintiff upon his birth in China in 1941 was a national of the United States. He is entitled to a decree to such effect. In the light of the decisions I have mentioned and others that I could cite, and in view of the discussion of the congregational committee at the time of the consideration of the applicable statute, I can come to no other conclusion.

Judgment will enter as prayed for.

Mr. Shucklin: Your Honor, just to bring the record up to date, there were four exhibits which I took out of court and had photostated, and they were returned to the file, but they were not given numbers. I was wondering if we should not have them numbered.

The Court: You may have them numbered by the clerk in accordance with the numbering of the originals.

(Photostatic copies of documents referred to were marked Plaintiff's Exhibits 6, 7, 8 and 9 and received in evidence.)

Mr. Shucklin: Your honor, in reference to the judgment to be presented, there will be findings of fact, conclusions of law and judgment?

The Court: I think so.

Mr. Shucklin: And does your Honor entertain

any idea of affixing a photograph of the plaintiff to the judgment?

The Court: If you and counsel agree, I am satisfied. If you do not see alike, I will consider that when that issue arises.

Mr. Shucklin: Will you set a date for the presentation of findings and conclusions and judgment?

The Court: I understand Mr. Belcher is leaving this afternoon to present matters before the Court of Appeals for the Ninth Circuit at San Francisco. You may confer with him.

(Discussion off record between court and counsel.)

Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

[Endorsed]: Filed December 17, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below, and that said pleadings, together with Plaintiff's Exhibits numbered 1 to 9, inclusive, offered in evidence at the trial of said cause constitute the record on appeal from the Judgment for Plaintiff filed and entered September 8, 1949, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Complaint
2. Praecipe for summons
3. Marshal's return on Summons (U. S. Attorney General)
4. Marshal's return on Summons (U. S. Secretary of State)
5. Appearance for Defendant.

6. Answer of Defendant.
7. Defendant's Memorandum of Authorities
8. Plaintiff's Supplemental Pleading and Motion for Substitution of Party Defendant
9. Plaintiff's Notice of Hearing on Supplemental Pleading and Motion for Hearing
10. Order Substituting Party Defendant
11. Marshal's return on Service of Writ (Dean Acheson, Secretary of State)
12. Brief for Plaintiff.
13. Marshal's return on Service of Writ (U. S. Attorney General)
14. Supplemental Brief of Plaintiff
15. and 16. Plaintiff's Notice of Presentation of Findings of Fact and Conclusions of Law and Declaratory Judgment of Citizenship
17. Findings of Fact and Conclusions of Law
18. Declaratory Judgment of Citizenship
19. Plaintiff's Notice of Appeal
20. Court Reporter's Transcript of Trial Proceedings
21. Appellant's Statement of Points on Appeal
22. Praecipe and Designation of Record on Appeal.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 14th day of December, 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: . No. 12431. United States Court of Appeals for the Ninth Circuit. Dean Acheson, Secretary of State of the United States, Appellant, vs. Yee King Gee by Yee Don Found, his next friend, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12431

DEAN ACHESON, Secretary of State of the
United States,

Appellant,

vs.

YEE KING GEE by YEE DON FOUND, his next
friend,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF PORTIONS OF
RECORD.

Appellant hereby adopts appellant's points on appeal and designation of portions of the record to be printed as heretofore filed with the Clerk of the United States District Court.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ JOHN E. BELCHER,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 27, 1949.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

DEAN ACHESON, Secretary of State
of the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found,
his next friend,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney
Attorneys for Appellant

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

FILED

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

DEAN ACHESON, Secretary of State
of the United States,

Appellant,

VS.

YEE KING GEE, by Yee Don Found,
his next friend,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney
Attorneys for Appellant

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

SUBJECT INDEX

	Page
JURISDICTION	1
STATEMENT OF THE CASE.....	3
POINTS ON APPEAL.....	7
SPECIFICATION OF ERROR.....	7
ARGUMENT	8
ON THE MERITS.....	10

TABLE OF CASES

<i>Deming ex rel U. S. vs. Ward</i> , 37 Fed. (2d) 818..	10
<i>Lamar v. Micou</i> , 112 U.S., 452.....	10
<i>United States vs. Rockteschell</i> , 208 Fed. 530....	14

STATUTES

54 Statute 1171.....	2
----------------------	---

CODES

8 U.S.C.A., 601(g)	2, 11
8 U.S.C.A., 903	3, 4, 8
Nationality Act of 1940 (Sec. 503).....	2, 8

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

DEAN ACHESON, Secretary of State
of the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found,
his next friend,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The jurisdiction of the District Court for the Western District of Washington was challenged at the outset because the Appellee at the time of the commencement of the action had at no time ever been in the United States, and the defendant Secretary

of State being domiciled in the District of Columbia.

The Act, Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A. 903, conferring jurisdiction on United States District Courts providing:

“If any person who claims a right or privilege as a National of the United States is denied such right or privilege by any department or agency, or executive official thereof, upon the ground that he is not a National of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department or agency in the District Court for the District of Columbia or in the District in which such person claims a permanent residence for a judgment declaring him to be a national of the United States.”

The section further provides that if such person is outside the United States when he institutes his suit he may obtain from the diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be deported in case it shall be decided that he is not a National of the United States.

The Nationality Code of 1940 in subparagraph (g) Sec. 601, U.S.C.A., deals with and defines “Nationals” at birth, as follows:

“A person born outside the United States * * * of parents one of whom is a citizen of the United States *who, prior to the birth of such person, has had ten years residence in the United States* * * * .” (Italics supplied).

The claim of permanent residence of this minor child entitling him to maintain this action in the District Court for the Western District of Washington rather than the District of Columbia stems from the domicile of his father at Seattle, whose claim to American citizenship is by reason of the birth of his father, Yee Wing Haw, of Chinese parents resident in the United States. This domicile we do not deny, nor do we deny the American citizenship of the father Yee Don Found. But is the domicile of the father the true criterion for the determination of “*permanent residence*” of this minor child, who at the time of the commencement of this action in March, 1948, had never been in the United States since birth, in order to confer jurisdiction upon the District Court for the Western District of Washington, or under such circumstances does the jurisdiction lie in the District Court for the District of Columbia?

STATEMENT OF THE CASE

This is an action under the Nationality Act of 1940 (Title 8, Sec. 903, U.S.C.A.) against the Secretary of State of the United States of America. It

was originally instituted against George C. Marshall as such Secretary of State and after his resignation Dean Acheson was substituted as party defendant (R. 10).

The Appellee was born in China March 16, 1941, of Yee Don Found, an American citizen, and Yee Shee, a native-born Chinese woman.

In March, 1948, this action was commenced by Appellee through Yee Don Found, his next friend, because the American Consul General at Canton, China, refused to recognize the claimed American nationality of this minor child on the ground that the father of said minor, Yee Don Found, had not resided in the United States for a period of ten years prior to the birth of Appellee in China and refused to issue a passport or travel document entitling him to enter the United States.

After the institution of the action in 1948 the father, Yee Don Found, returned to China and brought his wife and two other children to the United States. The Appellee was not permitted to accompany them at that time but later, and in accordance with the provisions of Sec. 903, Title 8, U.S.C.A., a visitor's permit was issued to him (R. 40), admitted in evidence as plaintiff's Exhibit No. 2, which stated that Appellee's nationality status was pending before the

court and which certificate provided that Appellee may be admitted to the United States upon the condition that he would be subject to deportation in case it should be determined by the court that Appellee is not a National of the United States (Ex. 2, R. 40) and he was admitted conditionally February 24, 1949 (R. 37).

At the time of the institution of the action in March, 1948, the mother of Appellee, the Appellee and his two brothers were in China, although after the passage of an amendment to the Nationality Code in 1946 she and the two minor children born prior to 1941 were eligible for admission to the United States, but they chose to remain in China until 1948, when the husband and father returned to China and brought his wife and the older children to the United States November 18, 1948 (R. 3).

Later, as already stated, and on February 24, 1949, Appellee was conditionally admitted to the United States for the purpose of prosecuting this action. On May 10, 1949, a trial was had and evidence adduced and the matter taken under advisement pending further briefs on behalf of the parties. Thereafter, and on August 25, 1949, the court delivered its oral decision (R. 66-76).

There is no question raised as to the citizenship of the father of Appellee, Yee Don Found, and if Yee Don Found resided in the United States for ten years immediately preceding March 16, 1941 (the date of the birth of Appellee in China) Appellee, although born in China and although he had never been in the United States, nevertheless, under the law, is a National of the United States. On the other hand, if Yee Don Found had not had "ten years' residence in the United States" at the time of the birth of Appellee in China, then Appellee is not a National of the United States under the law.

The father of Appellee came to the United States on September 3, 1929. He left this country for China seven years later (August 2, 1936) married, and returned to this country in 1938 (being absent about two years). He departed for China January 6, 1940, and returned September 4, 1941, after an absence of one year and nine months. Appellee was born in China on March 16, 1941 (while the father was still in China). From this it is apparent that prior to the birth of Appellee the father, whose United States citizenship is admitted (R. 41) was in the United States for a period of only eight years and four months (R. 71).

POINTS OF APPEAL

1. Did the District Court for the Western District of Washington have jurisdiction of this proceeding?

2. Where a minor child born in China in 1941 as the lawful issue of the marriage of an American male citizen and a Chinese woman, which minor child had never been in the United States, can such minor child claim as his residence the domicile of his father, who resides in Seattle?

3. If the father of such minor child had not resided in the United States for a period of ten years immediately preceding the birth of that child in China, is the child a National of the United States under the provisions of 8 U.S.C.A. Sec. 601(g)?

SPECIFICATION OF ERROR

1. The trial court erred in assuming jurisdiction of this proceeding because the minor had never resided in the United States and had no "permanent residence" therein, and jurisdiction is vested in the District Court for the District of Columbia.

2. On the merits, the trial court erred in entering its judgment declaring Appellee a National of the United States because the male parent, whose United

States citizenship is admitted, but “who, prior to the birth” of Appellee, has not “had ten years’ residence in the United States.”

ARGUMENT

We will first deal with the question of jurisdiction of the District Court for the Western District of Washington. To determine this, the claim of “permanent residence” in the Western District of Washington must be examined.

The District Court determined its jurisdiction by resorting to the domicile of the father. We have heretofore set out herein under the caption “jurisdiction” the applicable provisions of Sec. 903, Title 8, U.S.C.A. — the 1940 Nationality Act — and will not repeat those provisions here, but desire to call attention to the words used after conferring jurisdiction on the District Court for the District of Columbia, which are: “*or in the District Court for the district in which such person claims a permanent residence.*” (Italics supplied).

Appellee, although never before in the United States, claims Seattle, in the Western District of Washington, as his “permanent residence” for the purpose of having the principal question involved de-

terminated in this jurisdiction instead of the District Court for the District of Columbia.

This claim of "permanent residence" is based entirely upon the domicile of his father, and is the sole ground upon which the District Court determined its jurisdiction (R. 72).

The requirement of a "claim of permanent residence" of one in a foreign country whose nationality is drawn in question, in order to confer jurisdiction upon the District Court in which the suit is instituted, pre-supposes a prior presence in the United States where a residence or domicile has previously been established and maintained and has no application to one who has theretofore never been in this country. It applies only to those who having acquired such "permanent residence" in the United States who have gone abroad and seek to return after having done some act which it is claimed has alienated their American citizenship.

Permanent residence can hardly be acquired by proxy.

A painstaking search by us has failed to uncover any adjudicated case dealing with this precise question. There are, of course, cases dealing with the term "residence" and "domicile" wherein those terms

have been defined, such as *Deming ex rel U. S. vs. Ward*, 37 Fed. (2d) 818, and *Lamar v. Micou*, 112 U.S. 452, but none under the Immigration Laws directly holding that where, as here, the husband leaving his wife in China for a period of ten years is said to have established a domicile in the United States while his wife was domiciled in a foreign country with the minor children of the parties.

We believe, under the circumstances of this case, that the jurisdiction was in the District Court for the District of Columbia and the District Court for the Western District of Washington was in error in its determination of jurisdiction.

ON THE MERITS

Prior to his temporary admission to the United States under a "visitor's permit" to enter this country to prosecute this action in the month of February, 1949, Appellee had never set foot on American soil. His entry in 1949 was permitted for the purpose of prosecuting this action.

His claim to the status of a National of the United States stems from his father, whom we admit, is the son of a native-born American citizen of Chinese extraction.

The Act which entitled a person born abroad to

claim the status of a National of the United States is a part of the Nationality Act of 1940, Title 8, U.S.C.A., Section 601(g) of which provides:

“The following shall be Nationals and citizens of the United States, at birth:

“(g) A person born outside the United States * * * of parents, one of whom is a citizen of the United States, *who, prior to the birth of such person, has had ten years residence in the United States.*”

The evidence adduced at the trial shows that the father of Appellee first arrived in the United States on September 3, 1929, at Boston, Massachusetts. That he left the United States for China on August 21, 1936, being in the United States 7 years less 13 days. He re-entered the United States on August 8, 1938, being absent 2 years less 13 days. He left the United States for China on January 6, 1940, and was re-admitted on September 4, 1941, being absent just 1 year and 9 months. It was during this latter visit to China, and while the father was still in China, that the Appellee was born on March 16, 1941.

As so clearly stated by the trial court (R. 71) “Arithmetical computation will disclose that his physical presence in the United States prior to his son’s (Appellee’s) birth in 1941 was about eight years and fourth months.”

The Congress clearly provided for a residence of the father of *ten years* "prior to the birth" of Appellee.

In view of the fact that the father was in China when the son was born and did not return to the United States until six months after such birth, is strong evidence that he had established some sort of residence in China as early as July, 1940, or possibly earlier in that year because he left the United States in January, 1940, and did not re-enter the United States until September 1941.

The period which persons are required to live in the United States and be associated with the American manner of living was set by the Congress at *ten years* and not less. It seems clear that Congress in fixing the ten-year minimum residence requirement did not contemplate constructive residence as sufficient under this section of the law since this would, in effect, defeat the very purpose of the restriction.

Appellee's claim to American nationality rests entirely upon the allegation that his great grandfather was born in the United States.

The father, Yee Don Found, claims that his father, Yee Wing Haw, was born in China in 1890,

and when he (Yee Don Found) secured a passport to visit China in 1947, Yee Wing Haw was residing in China. It appears, therefore, that Yee Wing Haw, the grandfather of Appellee, is at best a nominal American citizen. Yee Don Found was born in China in 1913 and remained in China until 1929. It clearly appears, therefore, that the father of Appellee spent the formative years of his life in China, because he was sixteen years of age when he first came to this country. At the time of Appellee's birth in China in 1941, his father, Yee Don Found, was twenty-seven years of age. As of that date the father, Yee Don Found, had spent nineteen years and two months in China, and eight years and four months in the United States. From this, then, it clearly appears that at the time of the birth of Appellee in China in 1941 the father's place of general abode during his life had been China, and it is somewhat difficult to conclude that Appellee's father could, in periods of time spent in the United States, acquire that knowledge and experience in the American way of life which the minimum of ten years' residence the Congress believes to be necessary has not actually been spent in this country to entitle the offspring to successfully claim American nationality.

There is nothing, it seems to us, in the case of *United States v. Rockteschell*, 208 Fed. 530, from this circuit which militates against this view. That was a naturalization case, and, after discussing that particular statute, it was said:

“There is, however, no contention that since his first arrival, in 1894, he ever claimed a residence or a house, or in fact resided, in any other country.”

The contrary is true here. The family of the father of Appellee, that is, his mother and two other brothers, certainly had their residence in China at all times until shortly before the trial of this case in 1949, and almost three years of the time prior to the birth of Appellee were spent by the father with his family in China. Surely it cannot be seriously contended that this three-year period spent in China with his family did not constitute the taking up, at least, of temporary residence in China by the father, which constitutes practically one-third of the ten-year residence requirement under the statute to entitle Appellee to successfully claim American nationality.

This case is one of first impression as we have been unable, after painstaking search and study, to find any adjudicated case where similar facts were involved.

We believe the District Court was in error in holding, as it did, that the father of Appellee had resided in the United States ten years preceding the birth of Appellee and its decree declaring Appellee to be a National of the United States should be reversed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

DEAN ACHESON, Secretary of State
of the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found,
his next friend,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR APPELLEE

J. P. SANDERSON
GERALD SHUCKLIN
OF HILE, HOOF AND SHUCKLIN
Attorneys for Appellee

J. P. SANDERSON
301-2 SECOND AND CHERRY BUILDING
SEATTLE 4, WASHINGTON

GERALD SHUCKLIN
533 DEXTER HORTON BUILDING
SEATTLE 4, WASHINGTON

FILED

APR 11 1950

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

DEAN ACHESON, Secretary of State
of the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found,
his next friend,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR APPELLEE

J. P. SANDERSON
GERALD SHUCKLIN
OF HILE, HOOFF AND SHUCKLIN
Attorneys for Appellee

J. P. SANDERSON
301-2 SECOND AND CHERRY BUILDING
SEATTLE 4, WASHINGTON

GERALD SHUCKLIN
533 DEXTER HORTON BUILDING
SEATTLE 4, WASHINGTON

SUBJECT INDEX

	Page
STATEMENT OF THE CASE.....	1
JURISDICTION	2
CITIZENSHIP	7
RESIDENCE	8
ARGUMENT ON THE MERITS.....	11
CONCLUSION	17

TABLE OF CASES

<i>Appleton v. Southern Trust Co.</i> , 51 S.W. (2d) 447	7
<i>Attorney General v. Ricketts</i> , 165 Fed. (2d) 193..	2
<i>Bauer v. Clark</i> , 161 Fed. (2d) 397.....	2
<i>Brassert v. Biddle</i> , 148 Fed. (2d) 134.....	2
<i>Chin Wing Dong v. Clark</i> , 76 Fed. Supp. 649....	3
<i>Davenuto v. Curran</i> , 299 Fed 206.....	13, 14
<i>Delaware v. Petrowsky</i> , 250 Fed. 554.....	6
<i>Ex Parte Woo Show How</i> , 17 Fed. (2d) 652.....	11
<i>Ex Parte Yee Gee</i> , 17 Fed. (2d) 653.....	11
<i>Gan Seow Tun v. Carusi</i> , 83 Fed. Supp. 480 and 482	3
<i>In re Chung Toy Ho</i> , 42 Fed. 398.....	4
<i>In re Tung Leone</i> , 19 Fed. 184.....	4
<i>Lamar v. Micou</i> , 112 U.S. 452, 470.....	4
<i>Look Yun Lin v. Acheson</i> , 87 Fed. Supp, 463.....	3
<i>Nuspel v. Clark</i> , 83 Fed. Supp. 963.....	3
<i>Podeau v. Acheson</i> , 170 Fed. (2d) 306.....	3

TABLE OF CASES (Continued)

Page

<i>United States v. Rockteschell</i> , 208 Fed. 530.....	15
<i>Weedin v. Chin Bow</i> , 274 U.S. 657.....	7
<i>Yarborough v. Yarborough</i> , 290 U.S. 202.....	5

MISCELLANEOUS

Funk & Wagnall's Dictionary.....	6
Webster's Dictionary.....	7
House Committee Report 9980.....	12
Restatement of Conflicts.....	4

STATUTES

Section 1993, Revised Statutes.....	7, 17
Act of September 13, 1888.....	10
Immigration Act of 1924.....	7, 9, 10
Act of May 16, 1932.....	11
Act of May 24, 1934.....	7
Nationality Act of 1940.....	2, 7, 8, 10, 11
Act of December 17, 1943.....	10

CODES

	Page
8 U.S.C. 6.....	7
8 U.S.C. 210.....	10
8 U.S.C. 213c.....	9
8 U.S.C. 261.....	10
8 U.S.C. 275-278 (First Edition).....	10
8 U.S.C. 504.....	12
8 U.S.C. 601.....	2, 7, 8
8 U.S.C. 707.....	12
8 U.S.C. 804.....	10
8 U.S.C. 903.....	2
8 U.S.C. 907.....	12
22 U.S.C. 217a.....	11

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

DEAN ACHESON, Secretary of State
of the United States,
Appellant,

vs.

YEE KING GEE, by Yee Don Found,
his next friend,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

It is conceded that the Statement of the Case as set forth in Appellant's brief, P. 3 to 6, is substantially correct except date of original arrival of Yee Don Found, the father of Appellee, which was August 6, 1929 (Plaintiff's Exhibit 1, R. 23, 24, 39, 47).

The Appellant objects to the jurisdiction of the trial court on the ground the Appellee had never been in the United States prior to the commencement of this action. The Appellant further alleges that the trial court erred in declaring Appellee to be a national of the United States because his father did not have a residence in the United States for ten years prior to the birth of the Appellee. These points are the gist of the case.

JURISDICTION

This action was brought under authority of Section 503 of the Nationality Act of 1940, 8 U.S.C., 903, on the ground the Appellee is a national and a citizen of the United States since birth as provided for by Section 201(g) of the same Act, 8 U.S.C. 601, quoted in Appellant's brief, P. 2, 3.

It is well settled that actions under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, may be brought in any United States District Court in any State. Jurisdiction was assumed in the following cases:

Brassert v. Biddle, Attorney General, 2d Cir. 148 Fed (2d) 134;

Bauer v. Clark, Attorney General, 7th Cir. 161 Fed. (2d) 397;

Attorney General v. Ricketts, 9th Cir. 165 Fed. (2d) 193;

Podeau v. Acheson, 3d Cir. 170 Fed. (2d) 306;
Nuspel v. Clark, (D.C. E.D. Mich.) 83 Fed.
 Supp. 963;

Chin Wing Dong v. Clark, (D.C. W.D. Wash)
 76 Fed. Supp. 649;

Gan Seow Tun v. Carusi, (D.C. S.D. Cal.) 83
 Fed. Supp. 480 and 482;

Look Yun Lin v. Acheson, (D.C. N.D. Cal.) 87
 Fed. Supp. 463.

In the last case cited Judge Erskine says:

"By the terms of Section 503 of the Nationality Act of 1940 this action may be brought in the District Court of the United States for the District in which the plaintiff claims a permanent residence. * * * Defendant's first objection goes to the issue of venue or 'territorial jurisdiction,' contending that plaintiff has no possible claim to permanent residence in this district. However, the statute permits suit to be brought in the district where the plaintiff 'claims' a permanent residence * * * . *Actual residence at present or at any time in the past is not required.*

* * * In view of the fact that an attempt was made by the father to bring his alleged daughter, the plaintiff, to this country while she was still a minor, plaintiff has some basis for a bona fide claim of permanent residence within this district. This Court should not presume a change of domicile or residence in order to defeat venue. * * * In the present case, where the plaintiff is abroad, and the issue of venue is raised, it is the District Court of the Northern District of California in which the facts of the case are most readily available, since plaintiff's claim to citizenship stems from her father, a resident of California." (Italics supplied).

It is self-evident that the Appellant's Specification of Errors, P. 7, 8, is definitely and completely defeated and repudiated by Section 503 quoted by Appellant, P. 2.

Restatement of Conflicts, Sec. 30, states a minor child has the same domicile as that of his father.

In re *Chung Toy Ho*, (C.C. D. Ore.) 42 Fed 398, a Chinese merchant petitioned for entrance of his wife and daughter. They came from China, sought admittance and were refused. The Treaty of 1888 forbade the entrance of Chinese laborers, but the Treaty of 1884 stated Chinese merchants can come and go of their own free will. The court held that

"It is impossible to believe that parties to this treaty, which permits servants of a merchant to enter the country with him ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission is found in the fact that the domicile of the wife and children is that of the husband and father." In re *Tung Leone*, (D.C. D. Cal.) 19 Fed. 184.

The principle that a child's domicile is that of his father is expressly stated in *Lamar v. Micou*, 112 U. S. 452, 470. The children involved in this case had a guardian in New York. They lived in Georgia, their parents having died. The issue is over an

accounting of the wards' property by the estate of the guardian. The court stated:

"The law of domicile governs the status of a person and the disposition and management of his property. An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own, and after his death the mother, while she remains a widow, may likewise, by changing her domicile change the domicile of the infants; the domicile of the children in either case, following the independent domicile of their parent."

Yarborough v. Yarborough, 290 U.S. 202. In this case, a daughter sued her father for support money while attending school in South Carolina. Previously, Yarborough had secured a Georgia divorce in which there had been a final adjudication of alimony and support. The father contends South Carolina must give full faith and credit to the Georgia decree. It was contended that since the child was not a formal party to the Georgia suit she is not bound by the decree.

The Supreme Court held the decree was binding on the child. It was further contended the Georgia order should not be binding on the child since she was not a resident of Georgia at the time it was entered. The court stated:

“Being a minor Sadie’s domicile was that of her father * * * She was not capable of changing her domicile by her own act. Neither the temporary residence in North Carolina at the time the divorce suit was begun nor her removal with her mother to South Carolina before entry of judgment effected a change of Sadie’s domicile. The mere fact the parents were living separately at the time the suit for divorce was brought and that the child was with her mother does not establish a relinquishment of parental authority.”

Delaware v. Petrowsky, 2nd Cir. 250 Fed. 554.

The case involves the right of an emancipated child to sue. In discussing domicile the court said that the law is well established that every person at his birth acquires a domicile of origin which is that of the person on whom he is legally dependent which in the case of a legitimate child is that of his father. The general rule is also well established that a person while a minor being non sui juris cannot change his or her domicile.

“The words domicile and residence are frequently used synonomously by the courts and in statutes, but technically the latter word indicates merely the present place of abode of a person whether temporary or permanent, whereas domicile always means a permanent home.” *Funk & Wagnall’s New Standard Dictionary*, P. 2092, 1935.

“Residence of a wife is that of her husband; of a child, that of the father. * * * Act or fact of

abiding or dwelling in a place for some time; act of making one's home in a place." *Webster's Standard Dictionary*, P. 1814, 1933.

"Temporary residence out of state, even for an indefinite period, will not constitute person 'non-resident,' if, at departure and during absence, he had intention to return to state." *Appleton v. Southern Trust Co.*, 51 S.W. (2d) 447.

CITIZENSHIP

"All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States." R.S. 1993 8 U.S.C. 6, First Edition. *Weedin v. Chin Bow*, 274 U.S. 657.

Section 1993 of the Revised Statutes was replaced by the Act of May 24, 1934, 8 U.S.C. 6, First Pocket Edition. The latter Act provides that "Any child hereafter" born out of the jurisdiction of the United States to an American citizen parent must come to the United States before 13 years of age in order to continue status of American citizenship.

The Act of May 24, 1934 was repealed and replaced by Section 201 of the Nationality Act of 1940, 8 U.S.C. 601.

Therefore, the father of the Appellee has been a citizen of the United States since birth. Appellant

concedes that the father is a citizen (R. 41, Appellant's Brief 6). His citizenship status is the same as a son of a late president of the United States born in Canada, now a Congressman from the State of New York and conceded by eminent lawyers to be eligible to hold the office of president of the United States. Such citizenship is distinguished from that by naturalization. The Appellee was born in China on March 16, 1941 (R. 47), and is a citizen of the United States under Section 201(g) of the Nationality Act of 1940, 8 U.S.C. 601.

RESIDENCE

The record evidence shows that Yee Don Found, father of Appellee, arrived in the United States at Boston, Massachusetts on August 6, 1929. (Plaintiff's Exhibit 1, R. 23, 24, 39, 47).

On the father's first return to China he left the United States on August 21, 1936 and returned on August 9, 1938, (R. 47). He was absent from the United States less than two years.

On the second trip the father left the United States on January 6, 1940 and returned August 28, 1941 (R. 30, 47). He was absent less than one year and eight months.

The record further shows that the father established a residence in the United States in 1929 and has consistently claimed a residence in the United States at all times since.

On each of the aforementioned two trips to China he applied for and received from the Immigration Service a Return Citizen's Certificate, Form 430, unlimited as to absence and was admitted under authority of said certificates upon return (Plaintiff's Exhibits 8 and 9, R. 26, 30, 45).

During 1948 the father made a brief visit to China and returned with his wife and two other children via San Francisco, November 18, 1948, in possession of a passport issued by the Department of State. (R. 37, 40). He was prohibited from bringing his alien wife to this country until after the Immigration Act of 1924 was amended on August 9, 1946, 8 U.S.C. 213(c).

The views expressed by the Appellant raises the question of whether a citizen of the United States could go to Canada on a ten-day fishing trip without losing his right of residence. If this question be answered "no" could a citizen of the United States leave his residence here and proceed under contract for an indefinite period to work in the oil field in Canadian territory at the Arctic always with the in-

tention of returning, and does return to the United States within two years? The answer is that there is no authority to hold under such circumstances a citizen of the United States since birth could lose his citizenship or right of residence. Under Section 404 of the Nationality Act of 1940, 8 U.S.C. 804, a naturalized citizen may lose citizenship and right of residence if absent more than two years at any one time, — under circumstances stated. If this last provision of law is enforced the person involved could only be admitted on return as an alien in possession of an Immigration Visa and upon payment of head tax.

Section 10 of the Immigration Act of 1924, 8 U.S.C. 210, provides for the issuance of a Permit to Reenter the United States in case of an alien who has a legal permanent admission, valid for one year with the privilege of renewal for unlimited periods of six months, and credited with returning from a temporary absence abroad. An *alien* under this provision does not lose right of acquired residence even if absent more than two years.

The Act of September 13, 1888, of the Chinese Exclusion Laws, concerning the departure and return of alien Chinese laborers, 8 U.S.C. 275 - 278 (Repealed by the Act of December 17, 1943, 8 U.S.C.

261, Pocket Edition) provided for the issuance of return certificates valid for return within one year from date of departure, with the privilege of an extension of one year if unavoidably detained, without losing right of residence in this country. See *Ex Parte Woo Show How* (D.C. W.D. Wash.) 17 Fed. (2d) 652 and *Ex Parte Yee Gee*, (D.C. N.D. Cal.) 17 Fed. (2d) 653.

Passports are issued by the State Department at Washington, D. C. valid for return within two years, subject to renewal by consuls in foreign countries, to citizens for the purpose of visiting in foreign countries. Act of May 16, 1932, 22 U.S.C. 217(a). It is unthinkable that the United States would treat any form of a return certificate issued to a citizen as a "scrap of paper" or attempt to penalize the rights of a citizen or deprive a citizen of acquired residence on the ground of absence of less than two years.

ARGUMENT ON THE MERITS

All of the present nationality and naturalization laws are included in the Nationality Code of 1940 (8 U.S.C. 907).

H. R. 6127, superseded by H. R. 9980 was a "Bill to Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code" and was debated and considered by the Com-

mittee on Immigration and Naturalization on various dates between January 17 and June 5, 1940. The committee was assisted by experts on the subject from the Departments of State, Labor and Justice, the Immigration and Naturalization Service and the Bar Association of the District of Columbia. Section 201(g) was eventually passed by the House and Senate in accordance with the original administration bill.

It is important to note that "continuous residence" was not mentioned in the Committee consideration of Section 201(g). The distinction between "residence" and "continuous residence" is material.

8 U.S.C. 504:

"Sec. 104. For the purposes of Sections 201, 307(b), 403, 404, 405, 406 and 407 of this Act, the place of general abode shall be deemed the place of residence."

Domicile is not mentioned in any of the foregoing sections.

House Committee Report, H.R. 9980, p. 54:

"Mr. Poage. I see. 'Place of general abode' is about as broad a definition as I have ever seen." (Representative William R. Poage, Texas, member of committee considering bill).

Section 307(a) of the Nationality Code of 1940 (8 U.S.C. 707) includes the term "resided continu-

ously" twice among the requirements for naturalization.

"Sec. 307(b) * * * Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship * * *."

If the lawmakers intended in Section 201(g) that the father "reside continuously" in the United States it is evident that they would have said so as they did in Section 307 of the same act.

The attention of the Court is invited to the case of *Devenuto v. Curran, Commissioner of Immigration*, 9th Cir. 299 Fed. 206, wherein "residence," "continuous residence," and "domicile" with reference to the Immigration and Naturalization laws as well as other laws is discussed with authorities.

We quote some of the outstanding points from the foregoing decision:

P. 209:

"A person's domicile is the place where he has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Immigration Rules Feb. 1, 1924, rule 12, subd. A, par. 2. No person is without a domicile, and he can have but one at the same time. Assuming that Devenuto was born in Italy of Italian parents, his domicile of origin was in that country. If, after he attained his majority, he came to the

United States with the intention of remaining here and making this his permanent home, and was admitted into this country, he thereby acquired an American domicile. For it is a rule of common law that every person sui juris may acquire a domicile of his own choice. * * * A domicile of choice is determined upon residence and intent * * *."

P. 211.

"Residence denotes a place of abode, without regard to whether it be temporary or permanent, while a domicile is the place where the law regards the person to be, whether or not he is corporeally found there. And one may have several residences at the same time but he can have only one domicile at a time."

P. 212.

"If Congress had meant that the alien must remain actually within the territory of the United States uninterruptedly during the five years, it would have used language like that of Act March 3, 1813, c. 42, No. 12, 2 Stat. 811 'for the continued term of five years next preceding his admission as aforesaid have resided within the United States without being at any time during the said five years out of the territory of the United States'." (Quoting from in *Re Schneider*, 164 Fed. 335).

* * *

"If the facts do not clearly show an intention on the part of the applicant to abandon a residence which he has acquired in this country, he must be deemed to be continuing to reside here." (Quoting from *United States v. Cantini*, 199 Fed. 857).

In *United States v. Rockteschell*, 9th Cir. 208 Fed. 530, the court held that the Naturalization Act did not require an applicant for citizenship to be physically present continuously in the United States for a period of five years. It will be noted that the statute in question provided as follows:

“No alien shall be admitted to become a citizen who has not, for the continued term of five years next preceding his admission, resided within the United States.”

Quoting from the decision (p. 532-533):

“It is familiar knowledge that the word ‘reside’ is capable of different meanings, and when employed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown upon the intent of Congress by the history of the statute. As originally enacted April 14, 1802 (2 Stat. 153 c. 28), the requirement was simply of five year’s residence in the United States, and as then construed the term ‘residence’ meant ‘domicile’. *In re an Alien*, Fed. Cas. No. 201a. By the amendment of March 3, 1813 (2 Stat. 811 c. 42) the section was made to read as follows: ‘No person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for a continued term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years, out of the territory of the United States’. Through the change thus wrought Con-

gress very clearly evinced its intention of requiring continuous physical presence. But upon the other hand, the fact that in the revision clause, 'without being at any time during the said five years out of the territory of the United States,' was omitted, would seem to indicate a purpose again to abandon this requirement. It has been held that under the present law continuity of physical presence is not required. *In re Schneider* (C.C.) 164 Fed. 335; *United States v. Cantini* (D.C.) 199 Fed. 857. This we believe to be a correct interpretation both of the new law and of Section 2170 of the Revised Statutes. To establish a residence there must doubtless be a concurrence of act and intent; but when once established, temporary absences from time to time, unaccompanied by an intent to abandon or change the residence, do not interrupt the continuity thereof. There is nothing in the Naturalization Act, other than the phrase itself, 'has resided continuously within the United States,' to indicate a purpose upon the part of Congress to require continuous physical presence, and in the practical administration of the law such a construction would entail consequences harsh in the extreme. Within reasonable limits, therefore, it is a question of fact, to be determined in the light of all the attendant circumstances of each particular case, whether the continuity of residence has been broken by temporary absences."

CONCLUSION

The father of the Appellee has been a citizen of the United States since birth under Section 1993 of the Revised Statutes and has been a bona fide resident of the United States since August 6, 1929. He made three temporary trips to China and on his last trip returned with his wife and two other children. On each of his trips he first obtained from the government assurance of return and returned to an unrelinquished residence. The Appellee was born in China on March 16, 1941 to a father who had a residence of more than ten years in the United States and is therefore a citizen of the United States since birth.

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

J. P. SANDERSON

GERALD SHUCKLIN

of Hile, Hoof and Shucklin

Attorneys for Appellee.

No. 12,431

IN THE
United States Court of Appeals
For the Ninth Circuit

DEAN ACHESON, Secretary of State of
the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found,
his next friend,

Appellee.

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division.

Honorable Lloyd L. Black, Judge.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE.

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California,

Amicus Curiae.

FILED

SEP 2 1950

Subject Index

	Page
Statement of the case.....	1
Questions	3
Statute involved	3
Argument	5
Jurisdiction	5
Citizenship	14
Conclusion	21

Table of Authorities Cited

Cases	Pages
Ada County v. Oregon Short Line R. Co., 97 F.2d 669.....	18
Albion-Idaho Land Co. v. Naf. Irr. Co., 97 F.2d 439.....	8
Attorney General v. Ricketts, 9 Cir., 165 F.2d 193.....	7
Bauer v. Clark, Attorney General, 7 Cir., 161 F.2d 397.....	7
Binderup v. Pathe Exchange, 68 L. Ed. 308, 44 S. Ct. 96, 263 U. S. 291	6
Bogan v. Hynes, 65 F.2d 524, certiorari denied, 54 S. Ct. 126, 78 L. Ed. 594	15
Bowles v. Mannie & Co., 155 F. 129.....	18
Bowles v. Seminole Rock & Sand Co., 89 L. Ed. 1700.....	17
Brassert v. Biddle, Attorney General, 2 Cir., 148 F.2d 134..	7
Brewster v. Gage, 74 L. Ed. 457.....	17
Champlin Refining Co. v. Gasoline Products Co., 29 F.2d 331	15
City of New York v. Saper, 69 S. Ct. 554, 336 U. S. 328.....	16
Commissioner of Immigration v. Gottlieb, 265 U. S. 310, 44 S. Ct. 258	12
Doyle v. Loring, 107 F.2d 337, cert. den. 84 L. Ed. 1029....	8
Fidelity & Casualty Co. of New York v. Griner, 44 F.2d 706	15
In re April May Van Gilder, file AA4584, March 12, 1946..	20
In re Chu Sze Chiang, 1300-99443, July 28, 1950.....	21
In re Eldeen Wai Hoi Fok, A-7047289, Dec. 6, 1948.....	21
Johnson v. Southern Pac. Co., 36 S. Ct. 159, 239 U. S. 382..	12
Kline v. Burke Construction Co., 67 L. Ed. 226, 43 S. Ct. 79, 260 U. S. 226	5
Lamar v. Micou, 112 U. S. 452.....	14
Lake County v. Rollins, 9 S. Ct. 651, 130 U. S. 662.....	12
Look Yuen Lin v. Acheson, 87 Fed. Supp. 463.....	7
Louisville & N. R. Co. v. Chatters, 26 F.2d 403.....	8
Lynn Patricia Burnard, 56172/878	20
Matter of Cornelius, 56175/231, May 8, 1945.....	21
Matter of Foster, file 23/91438, September 17, 1943.....	21

	Pages
N. L. R. B. v. Medo Photo Supply Corp., 135 F.2d 279, <i>affd.</i> 88 L. Ed. 1007	18
North American Utility Securities Corp. v. Posen, 176 F.2d 194	17
Northwestern Mutual Fire Ass'n v. C.I.R., 181 F.2d 133....	16
Owens v. Huntling, 115 F.2d 160.....	13
Petition of Aganesoff, 20 F.2d 978.....	13
Podeau v. Acheson, 3 Cir., 170 F.2d 306.....	7
Queensboro Farms Products v. Wickard, 137 F.2d 969.....	18
Richard Kees Brameyer, file A-6405632, May 12, 1947.....	20
Standard Stoker Co. v. Lower, 46 F.2d 678.....	8
Sydney Joel Kadwell, file 1415-830.....	20
U. S. v. Cerecedo Hermanos y Compania, 52 L. Ed. 821.....	17
U. S. v. Curran, 299 F. 206.....	13
U. S. v. Missouri Pac. Ry. Co., 49 S. Ct. 133, 278 U. S. 269...	12
U. S. v. Moskowitz, 170 F.2d 870.....	18
U. S. v. Novero, 58 F. Supp. 275.....	13
U. S. v. Rosenblum Truck Lines, 86 L. Ed. 671, 326 U. S. 455	12
U. S. v. Standnar Brewery, 40 S. Ct. 139, 251 U. S. 210.....	12
U. S. v. Twelve Ermine Skins, 78 F. Supp. 734.....	13
Utah Fuel Co. v. National Bituminous Coal Comm., 59 S. Ct. 409, 306 U. S. 56, 83 L. Ed. 483.....	7
Wong Wah Chill, file 56232/575.....	20
Woods v. Western Holding Co., 173 F.2d 655.....	16
Yarbrough v. Yarbrough, 54 S. Ct. 181, 290 U. S. 202.....	13

Statutes

Nationality Act of 1940:

Section 201(g) (8 U.S.C.A. 601).....	2, 4, 21, 22
Section 327 (8 U.S.C.A. 727).....	19
Section 339 (8 U.S.C.A. 739).....	19
Section 503 (8 U.S.C.A. 903).....	1, 3, 7, 8, 10

United States Code Annotated:

Title 28, Section 1343	6
------------------------------	---

Texts	Page
17 Am. Jur. 593.....	13
17 Am. Jur. 635.....	14
19 C. J. 397.....	13
19 C. J. 411.....	14
48 C. J. 1041.....	11
28 C. J. S. 7.....	13
36 C. J. S. 811.....	8
9 R. C. L. 547.....	14

Miscellaneous

86 Congressional Record, Part 12, page 13247, et seq.	12
Constitution of the United States, Article 3, Section 1.....	5
Department of State Publication 1708, Hackworth, Digest of International Law, Volume II, pages 435, 436.....	19
House Committee Report on H.R. 9980.....	16
Immigration and Naturalization Service Monthly Review, June, 1946, Volume II, No. 12, page 325.....	21

No. 12,431

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DEAN ACHESON, Secretary of State of
the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found,
his next friend,

Appellee.

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division.

Honorable Lloyd L. Black, Judge.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE.

STATEMENT OF THE CASE.

On January 16, 1948, the appellee by his next friend, filed in the United States District Court for the Western District of Washington, Northern Division, a complaint asking for a declaratory judgment of United States nationality. The said complaint was filed pursuant to the provisions of Section 503 of the Nationality Act of 1940. (8 U.S.C. 903.)

The complaint alleges that YEE DON FOUND, father of the appellee, is a United States citizen; that

the said YEE DON FOUND first came to the United States for permanent residence on August 6, 1929; that the said YEE DON FOUND subsequently made two temporary visits to China; that the appellee, who was born on March 16, 1941, is the son of YEE DON FOUND; that the appellee, YEE KING GEE, acquired United States citizenship at birth under the provisions of Section 201(g) of the Nationality Act of 1940 (8 U.S.C.A. 601); that the American Consul General at Canton, China, refused to recognize the appellee's claim to United States nationality; and that the appellee claims permanent residence at Seattle, Washington, where his father resides. (T. 2-5.)

Many material allegations of the complaint are admitted in the answer. The answer, however, pleads several affirmative defenses, namely that the District Court at Seattle, Washington, does not have jurisdiction of the matter and that the appellee did not acquire United States citizenship at the time of his birth. (T. 8 and 9.) The first affirmative defense alleges that the place of residence of the defendant is the City of Washington in the District of Columbia. The second defense alleges that the father, YEE DON FOUND, had not resided in the United States for ten years at the time of the birth of the appellee on March 16, 1941.

The trial court found that the appellee had, upon substantial basis and in good faith, a claim to permanent residence at Seattle, Washington; that the trial court had jurisdiction of the matter; and that the appellee's father never abandoned his United States

residence during his two temporary trips to China prior to the birth of the appellee and subsequent to his admission in 1929. (T. 11-13.)

QUESTIONS.

1. Did the United States District Court at Seattle, Washington, have jurisdiction of this proceeding?

2. Did YEE DON FOUND, father of the appellee, have ten years residence in the United States prior to the birth of the appellee, YEE KING GEE?

STATUTE INVOLVED.

Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) reads as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn

application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided.” (54 Stat. 1171-1172; 8 U.S.C. 903.)

Section 201(g) of the Nationality Act of 1940 (8 U.S.C. 601) reads in part as follows:

“A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had *ten years*’ residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of *sixteen years*, the other being an alien: Provided, That in order to retain such

citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years *between the ages of thirteen and twenty-one years*: Provided further, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of *sixteen years*, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease. * * * (54 Stat. 1138-1139; 8 U.S.C. 601.)”

ARGUMENT.

JURISDICTION.

The word “jurisdiction” connotes the power to adjudicate a justiciable controversy. The power of the inferior federal courts emanates from statutory law.

Section 1 of Article 3 of the Constitution of the United States provides:

“The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish.”

It was stated in the case of *Kline v. Burke Construction Co.*, 67 L. Ed. 226, 232, 43 S. Ct. 79, 260 U.S. 226 that:

“Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it does not extend beyond the boundaries fixed by the Constitution.”

Section 1343 of Title 28, United States Code Annotated, provides that the United States District Courts shall have original jurisdiction in matters which affect the rights or privileges of citizens of the United States.

It was stated by the Supreme Court of the United States in *Binderup v. Pathe Exchange*, 68 L. Ed. 308, 314, 44 S. Ct. 96, 263 U. S. 291 that:

“Jurisdiction is the power to decide a justiciable controversy, and includes question of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous; or, in other words, is plainly without color of merit.”

To present a case within the jurisdiction of the federal court, plaintiff must state a cause of action of which the statutes give federal courts jurisdiction, and whether the federal courts may assume jurisdiction is determinable by the allegations of the complaint. As a general rule, if the allegations of the bill in good faith make a claim within the jurisdiction of the court, the court has jurisdiction whether or not the claim is well founded.

Utah Fuel Co. v. National Bituminous Coal Comm., 59 S. Ct. 409, 306 U.S. 56, 83, L. Ed. 483, 487.

The pleadings in the case at bar show that there was existing at the time of filing of this complaint an actual controversy involving a federal question arising from federal statute. There can be no question as to the jurisdiction of the United State District Court at Seattle to decide the issue involved. Other federal courts have considered cases instituted under Section 503 of the Nationality Act of 1940:

Brassert v. Biddle, Attorney General, 2 Cir., 148 F.2d 134;

Bauer v. Clark, Attorney General, 7 Cir., 161 F.2d 397;

Attorney General v. Ricketts, 9 Cir., 165 F.2d 193;

Podeau v. Acheson, 3 Cir., 170 F.2d 306;

Look Yuen Lin v. Acheson, 87 Fed. Supp. 463.

Thus it must be determined that the question presented is one not of jurisdiction, which is undisputed, but one of venue. It has often been said that jurisdic-

tion and venue are not to be confused. *Standard Stoker Co. v. Lower*, 46 F.2d 678, 683.

It is admitted that the general rule is that suits against government officials involving acts done in their official capacity, must be instituted in the place of their official residence. Since the present suit was not filed in the District Court for the District of Columbia, the place of residence of the defendant, it becomes necessary to discuss this question.

The territorial jurisdiction of the lower federal courts is, except as it is otherwise expressly provided by statute, confined to, and co-extensive with, the territorial limits of the district in which they are placed. 36 C.J.S. 811; *Albion-Idaho Land Co. v. Naf. Irr. Co.*, 97 F.2d 439.

Section 1391 of Title 28, U.S.C.A. states that venue shall be limited to territorial jurisdiction "except as otherwise provided by law".

Where a statute specifies the venue of particular actions, the general rule as to venue may not apply. The federal statute determines the venue of the federal court.

Louisville & N. R. Co. v. Chatters, 26 F.2d 403;
Doyle v. Loring, 107 F.2d 337, Certiorari denied
 84 L. Ed. 1029.

Section 503 states: "* * * may institute an action * * * in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such per-

son *claims a permanent residence * * *.*" A review of the complaint in the instant case shows that it meets these requirements. The appellee asserted a claim to permanent residence within the territorial jurisdiction of the United States District Court for the Western District of Washington, Northern Division. (Italics ours.)

The Congressional debates shed little light on the venue provisions of Section 503. Section 503 was not in the original bill as passed by the House. A number of amendments, including a provision similar to the present section, were added by the Senate just prior to passage. There was no discussion on the floor of the Senate at any time. Upon return of the bill to the House a committee was appointed to meet with two conferees from the Senate to discuss the proposed amendments. The Congressional Record, Vol. 86, Part 12, page 13244 shows the following:

"Mr. Lesinski filed the following conference report and statement on the bill H.R. 9980, to revise and codify the nationality laws of the United States into a comprehensive nationality code:

CONFERENCE REPORT

* * * * *

Amendment numbered 5: That the House recede from its disagreement to the amendment of the Senate numbered 5, and agree to the same with an amendment, as follows:

In lieu of inserting the matter proposed to be inserted by the Senate amendment insert on page 92 of the House bill, between lines 10 and 11, the following:

(Section 503, as now enacted)

STATEMENT

* * * * *

Amendment No. 5: This amendment provides that persons claiming the rights or privileges of nationals of the United States might petition the district courts of the United States for judgments declaring them to be nationals. It provides further that any such person who is beyond the jurisdiction of the United States and has filed such petition might obtain from the appropriate consular officer a certificate of identity entitling him to enter into the United States. The House recedes with amendments which make a number of clarifying changes in the text of the Senate amendment and provide for the issuance of the certificate of identity only upon an application showing that the claim of nationality is made in good faith and has a substantial basis. The conference agreement also provides for appeals to the Secretary of State from denials of applications for such certificate of identity. The conference agreement transposes the text of this amendment to a more appropriate place in the bill and also make the necessary correction in section numbers."

Judge Erskine, in discussing the venue provisions of Section 503 in the case of *Look Yun Lin v. Acheson*, *supra*, stated:

"In the present case, where the plaintiff is abroad, and the issue of venue is raised, it is the District Court of the Northern District of California in which the facts of the case are most

readily available, since plaintiff's claim to citizenship stems from her father, a resident of California. It would seem to be a perversion of Congressional intent to say that plaintiff must bring her case in Washington, D. C., particularly when viewed in conjunction with the provision of the statute which permits the plaintiff in such an action to apply for temporary admittance to this country."

It has always been the rule of the courts to consider the convenience of witnesses and the interest of justice. In this particular case the statute specifically provides that any person, whether residing in the United States *or abroad*, may institute an action in the district where such person *claims* a permanent residence. The provisions of this part would be an absolute nullity if the ordinary rules of venue were to be applied.

The appellant in his brief (P. 9) states that the requirement of a "claim to permanent residence" presupposes a prior residence in the United States.

The statute on its face shows no such limitation, the remedy having expressly been made available to "any person". "Any person" is defined in Corpus Juris, Vol. 48, page 1041, as "Anybody; any human being".

Where the language of the statute is plain and unambiguous, there is no occasion for construction, even though other meanings may be found; and the court cannot indulge in speculation as to the probability of possible qualifications which might have

been in the minds of the legislature, but the statute must be given effect according to its plain and obvious meaning.

U. S. v. Missouri Pac. Ry. Co., 49 S. Ct. 133, 278 U.S. 269;

Commissioner of Immigration v. Gottlieb, 265 U.S. 310, 44 S. Ct. 258;

U. S. v. Standnar Brewery, 40 S. Ct. 139, 251 U.S. 210;

Lake County v. Rollins, 9 S. Ct. 651, 130 U.S. 662.

The court cannot attribute to the legislature an intent which is not in any way expressed in the statute.

Johnson v. Southern Pac. Co., 36 S. Ct. 159, 239 U.S. 382.

However, it has been said that: "where the plain meaning of words used in a statute produces an unreasonable result, plainly at variance with the policy of the legislature as a whole", we may follow the purpose of the statute rather than the literal words.

U. S. v. Rosenblum Truck Lines, 86 L. Ed. 671, 676, 326 U.S. 455.

During a discussion on the floor of the House between Congressmen Rees and Jenkins, a question similar to that here presented was the subject of discussion. It was there stated that one who was born abroad of a citizen parent, and who had *never* resided in the United States had the right under this statute to file a petition in the federal courts.

86 Congressional Record, Part 12, p. 13247, et seq.

A review of the Congressional intention as reflected by the debate, fails to show any inclination of Congress to limit the scope of judicial review to those who had previously resided in the United States.

The appellee's claim to permanent residence as alleged in the complaint is not frivolous. If we followed the strict legal meaning of the word "residence", the provisions of the Statute in question providing for a judicial remedy for those who are abroad would be superfluous and useless. Therefore, it is asserted that the language used in this act should be interpreted in its broader legal terminology.

It is a well recognized principal that the terms "domicile" and "residence" when used in statutes are often construed as synonymous.

U. S. v. Curran, 299 F. 206;

Owens v. Huntling, 115 F.2d 160;

Petition of Aganesoff, 20 F.2d 978;

17 Am. Jur. 593;

19 C.J. 397;

28 C.J.S. 7.

A "domicile" is the place where the law regards a person to be, regardless of whether he is corporeally found there. It is the place assigned to him by law.

U. S. v. Novero, 58 F. Supp. 275;

U. S. v. Twelve Ermine Skins, 78 F. Supp. 734.

The domicile of a legitimate child, during minority and until emancipation, ordinarily follows that of the father, while the latter is alive.

Yarbrough v. Yarbrough, 54 S. Ct. 181, 290

U.S. 202;

Lamar v. Micou, 112 U.S. 452;
19 C. J. 411;
9 R. C. L. 547;
17 Am. Jur. 635.

The statute in this case specifically states the appellee need only make a claim of permanent residence, in order to establish venue. Here we have more. Under the ordinary legal concepts, the appellee, as a matter of law, has a bona fide domicile within the territorial jurisdiction of the District Court whereat this petition was filed. The claim is substantial and merits consideration of the court.

CITIZENSHIP.

The question raised by this appeal is whether YEE DON FOUND, father of the appellee, had ten years residence in the United States prior to the birth of the appellee as required by the provisions of Section 201(g) of the Nationality Act of 1940.

The record shows that YEE DON FOUND first arrived in the United States at Boston, Massachusetts, on August 6, 1929; that YEE DON FOUND subsequently made two temporary trips to China, departing and returning as follows:

Departing August 21, 1936;
Returning August 8, 1938;
Departing January 6, 1940;
Returning September 4, 1941.

The appellee was born during the latter trip to China.

If the statute contemplates actual physical presence in the United States for a ten year period, the appellant's contentions are correct. If the law requires residence in its ordinary legal concept, the appellee must prevail.

The lower court made findings of fact wherein it is concluded that YEE DON FOUND made two temporary trips to China for the purpose of visiting his relatives and for no other purpose; that he never intended to abandon his United States residence; and that the said YEE DON FOUND has resided continuously in the United States since August 6, 1929.

It has often been stated that in the absence of statutory authority appellate courts will not review questions of fact, they will limit their review to correction of errors at law.

Champlin Refining Co. v. Gasoline Products Co., 29 F.2d 331;

Bogan v. Hynes, 65 F.2d 524, certiorari denied, 54 S. Ct. 126, 78 L. Ed. 594.

When the appellate court does consider the action of the lower court, only evidence favorable to the successful party will be considered.

Fidelity & Casualty Co. of New York v. Griner, 44 F.2d 706.

It is contended that there is more than sufficient evidence to show that the lower court's findings are not an abuse of its discretion. In addition, it is asserted that the lower court placed the proper interpretation upon statutory language used in Section 201(g).

Section 104 of the Nationality Act provides:

“For the purposes of Section 201, 307(b), 403, 404, 405, 406, and 407 of this Act, the place of general abode shall be deemed the place of residence.”

Reports and explanatory statements of legislative committees, even though not binding on the courts, may be considered as indicative of a legislative intent when the language used in a particular Act is not clear or is ambiguous.

City of New York v. Saper, 69 S. Ct. 554, 560;
336 U.S. 328;

Woods v. Western Holding Co., 173 F.2d 655;
Northwestern Mutual Fire Ass'n. v. C.I.R., 181
F.2d 133.

House Committee Report on H.R. 9980, which later became the Nationality Act of 1940, P. 54, shows:

“‘Place of general abode’ is about as broad a definition as I have ever seen.”

Report of the Committee on the Judiciary, pursuant to Senate Resolution 137, a resolution to make an investigation of the immigration system, is enlightening. Even though this report is subsequent to the enactment of the Nationality Act of 1940, this committee made a comprehensive study of all existing laws and presented an omnibus bill containing many proposed changes. At page 713, in said publication, the committee stated when considering section 201(g):

“The committee finds that the provisions of existing law relative to citizenship of children born

abroad of a citizen parent or parents are confusing and difficult to administer and interpret, particularly with reference to residence requirements, both of parents and children.'

* * * * *

'The present law requires 10 years' residence, at least 5 of which were after the age of 16. The "residence", however, does not necessarily mean physical presence.' "

When a statute is not clear, the courts will often look to executive construction for guidance in interpretation of the language used.

The Supreme Court of the United States stated in the case of *U. S. v. Cerecedo Hermanos y Compania*, 52 L. Ed. 821, 822:

"We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution."

Also:

Bowles v. Seminole Rock & Sand Co., 89 L. Ed. 1700, 1702;

Brewster v. Gage, 74 L. Ed. 457, 462.

It was stated by the Court of Appeals, in 2nd Circuit, in the case of *North American Utility Securities Corp. v. Posen*, 176 F.2d 194 at P. 197:

"An administrative interpretation which runs counter to a legislative enactment, is, of course, of no significance; but where the meaning of a statutory provision is not clear, the interpretation put upon it by those charged with the duty

of administering the Act is entitled to great weight.”

The Court of Appeals for the 7th Circuit expressed the same view in the case of *Bowles v. Mannie & Co.*, 155 F. 129, wherein the court stated:

“Be that as it may be, we must, however, be mindful of the admonition of the courts that the construction given to a statute (regulation) by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons, *U. S. v. Moore*, 95 U.S. 760, 763, 24 L. Ed. 558, and that the administrative interpretation is of controlling weight unless plainly erroneous or inconsistent with the regulations.”

This Honorable Court expressed the same view in the case of *Ada County v. Oregon Short Line R. Co.*, 97 F.2d 669, 671, i.e.:

“* * * the rule is that an interpretation of a statute by an agency charged with enforcement thereof is entitled to consideration and weight.”

Also see:

Queensboro Farms Products v. Wickard, 137 F.2d 969;

U. S. v. Moskowitz, 170 F.2d 870, 873;

N. L. R. B. v. Medo Photo Supply Corp., 135 F.2d 279, 281, affirmed 88 L. Ed. 1007.

The Immigration and Naturalization Service and not the defendant is charged with the administration of the Nationality Act of 1940.

Section 327 of the Nationality Act, 8 U.S.C.A. 727, specifically delegates the administration of the Nationality Act to the Commissioner, Immigration and Naturalization Service, under the immediate supervision of the Attorney General.

Section 339 of the same Act, 8 U.S.C.A. 739, as amended, states that the Commissioner may issue to one who acquired United States citizenship under the provisions of Section 201(g) a certificate of citizenship provided the Commissioner is satisfied that citizenship was so acquired.

The appellee in this action sought to obtain from the defendant, the appellant, a passport or travel document for use in coming to the United States.

It has been stated that "a passport, when granted, is not conclusive, nor is it even evidence, that the person to whom it is granted is a citizen of the United States." Passports are "not issued for use as certificates of citizenship, and the Department of State will not issue a passport to a person who indicates that he desires it merely for the purpose of establishing his status as a citizen of the United States." Both of the foregoing quotations are from official Department of State Publication 1708, Hackworth, Digest of International Law, Vol. III, Pgs. 435 and 436. Therefore, it must be concluded that the Immigration and Naturalization Service is the particular administrative body directed to decide who is and who is not a citizen of the United States.

In the case of *Lynn Patricia Burnard*, 56172/878, the Board of Immigration Appeals held on July 5, 1945, that the infant should be admitted as a United States citizen. In that case the citizen-father resided outside of the United States from the age of 19 to 21. It was held that he maintained his general abode in the United States and that his child born abroad acquired United States citizenship under Section 201(g).

In the case of *Sydney Joel Kadwell*, file 1415-830, the citizen-mother departed from the United States at the age of 18 years in order to join her husband who was then serving as a member of armed forces of Canada. It was held that nonetheless, the child, who was born after the mother's twenty-first birthday, acquired United States citizenship under Section 201(g).

In the case of *Wong Wah Chill*, file 56232/575, it was held that even though the record showed the father was not physically present in the United States for the ten year period, his principal place of abode was in the United States. In this case, the father had made a temporary trip to China for a period of nine months and twenty-nine days. It was found that the child is a citizen of the United States under Section 201(g). Other cases in point are:

In re April May Van Gilder, file AA4584, March 12, 1946;

Richard Kees Brameyer, file A-6405632, May 12, 1947;

Matter of Foster, file 23/91438, September 17, 1943;

Matter of Cornelius, 56175/231, May 8, 1945;

In re Eldeen Wai Hoi Fok, A-7047289, Dec. 6, 1948;

In re Chu Sze Chiang, 1300-99443, July 28, 1950.

The case of *Cornelius* was published in the Immigration and Naturalization Service Monthly Review, June, 1946, Vol. III, No. 12, at page 325.

It is submitted that the well established administrative rule, which has been consistently followed over a period of years, by the executive department charged with the enforcement of the Nationality Act is entitled to substantial weight in determining the proper construction to be placed upon Section 201(g) of the Nationality Act of 1940.

CONCLUSION.

The United States District Court for the Western District of Washington, Northern Division, had the power to adjudicate this justiciable controversy. Section 503 of the Nationality Act of 1940, by specific statutory language, states that venue of actions arising under this statute may be instituted in the district where the aggrieved claims permanent residence. That in this case the appellee in his complaint made a claim, which is not frivolous, to permanent residence within the territorial jurisdiction of the lower court.

The appellant's motion to dismiss upon this ground was properly denied.

The father of the appellee has been a citizen of the United States since birth and a bona fide resident of the United States since August 6, 1929. Section 201(g) of the Nationality Act of 1940 does not contemplate actual physical presence in the United States for the full ten year period. Residence within the meaning of the statute can only be determined from the union of act and intent as disclosed by the facts in the particular case. The lower court's finding that the father did not intend to abandon his residence during his temporary trips abroad are binding upon this court. Therefore, it must be concluded that the father did have ten years residence in the United States prior to the birth of the appellee.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
September 1, 1950.

Respectfully submitted,

JACKSON & HERTOGS,

By JOSEPH S. HERTOGS,

Amicus Curiae.

**In The United States Court of Appeals
For the Ninth Circuit**

DALE MENEFEE,

Appellant,

— vs. —

W. R. CHAMBERLIN Co., a corporation, *Appellee.*

FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

FILED

JAN 25 1950

PAUL P. O'BRIEN,
CLE

J. DUANE VANCE,
BASSETT & GEISNESS,
Proctors for Appellant.

811 New World Life Building,
Seattle 4, Washington.



In The United States Court of Appeals
For the Ninth Circuit

DALE MENEFEE,

Appellant,

— vs. —

W. R. CHAMBERLIN Co., a corporation, *Appellee.*

FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

J. DUANE VANCE,
BASSETT & GEISNESS,

Proctors for Appellant.

811 New World Life Building,
Seattle 4, Washington.



INDEX

	<i>Page</i>
Statement of Jurisdiction.....	1
Jurisdiction of the District Court.....	2
Jurisdiction of the Court of Appeals.....	2
Statement of the Case.....	3
Specification of Errors.....	8
Argument	8
The appellant was entitled to an award greatly in excess of the sum fixed by the trial court.....	8
Conclusion	14

TABLE OF CASES

<i>Baltimore SS. Co. v. Phillips</i> , 274 U.S. 316, 71 L.ed. 1069	2
<i>Mason v. U.S.</i> , 1948 A.M.C. 1052.....	12
<i>Menefee v. W. R. Chamberlin Co.</i> 1949 A.M.C. 1388	2, 3
<i>Panama Ry v. Johnson</i> , 26 U.S. 375, 68 L.ed 748....	2
<i>Portel v. U.S.</i> , 1949 A.M.C. 487.....	12
<i>Rogosich v. Union Dry Dock & Repair Co.</i> , 67 F. (2d) 377	2
<i>Walsh's Case</i> , 63 F. Supp. 421, 1945 A.M.C. 747, 152 F.2d 46, 1945 A.M.C. 1513.....	11

STATUTES

28 U.S.C.A. §41.....	2
28 U.S.C.A. §1291.....	2
46 U.S.C.A. §688.....	2

In The United States Court of Appeals
For the Ninth Circuit

DALE MENEFEE,	<i>Appellant,</i>	} No. 12124
vs.		
W. R. CHAMBERLIN Co., a corporation,	<i>Appellee.</i>	

FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The appellant, a seaman, filed a libel in personam against appellee, his employer, in the United States District Court for the Western District of Washington (Ap. 2), stating two causes of action: the first for compensatory damages for personal injuries alleged to be due to negligence of the appellee, and the second for wages, maintenance and cure. The appellee answered (Ap. 7).

The cause came regularly on for trial before the Honorable John C. Bowen, District Court Judge of the United States District Court for the Western District of Washington, Northern Division, and the Court entered a decree dismissing both causes of action. Thereafter the matter was appealed to this court by the libelant and pursuant to said appeal this court af-

firmed the trial court as to the second cause of action and reversed the holding of the trial court as to the first cause of action for compensatory damages for injuries suffered as the result of the negligence of the employer and remanded the case to the District Court for the fixing of appellant's damages (*Menefee v. W. R. Chamberlain Co.* 1949 A.M.C. 1388). Thereafter, the matter was presented to the District Court who after hearing the argument of counsel entered findings of fact and conclusions of law (Ap. 10), a decree (Ap. 13), and a written decision (Ap. 17), fixing the appellant's damages in the sum of \$750.00. Appellant thereafter duly prosecuted his appeal to this court.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is granted by the provisions of Title 28 U.S.C.A. Section 41 (this action having been commenced prior to the 1948 amendment of the Judicial Code), which vests jurisdiction of all admiralty causes in the Federal District Court. Although the statutory provisions of the Jones Act, 46 U.S.C.A. 688, are applicable these may be enforced in an admiralty proceeding, *Baltimore SS. Co. v. Phillips*, 274 U.S. 316, 71 L.ed. 1069; *Panama Ry. v. Johnson*, 26 U.S. 375, 68 L.ed. 748; *Rogosich v. Union Dry Dock & Repair Co.*, 67 F.(2d) 377.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Court is granted by the provisions of Title 28 U.S.C.A. 1291, which gives to the Courts of Appeal the jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE

All issues in this case have been resolved except the damages suffered by appellant as the result of the negligence of his employer; therefore, this statement refers only to that issue.

The appellant was injured or or about January 23, 1947 while employed as an ordinary seaman aboard the SS. ROBERT PARROTT on a voyage from Puget Sound to the Orient. The vessel having encountered heavy weather, the master ordered the mate to secure a mooring hawser which had been negligently and carelessly left lashed to the bulwark on the stern of the vessel (*Menefee v. W. R. Chamberlin Co.* 1949 A.M.C. 1388). The appellant was a member of the group selected for this task. The crew made their way aft into the gun crew's quarters and waited for an opportunity to go out and bring in the hawser (Tr. 16). After waiting awhile, the first mate, the boatswain and the appellant were the first ones out of the gun crew's quarters (Tr. 17). A huge wave came over, catching the men. The appellant testified concerning the events that followed thusly (Tr. 17):

“Q. How long were you on deck before the wave came over?

A. We just got out and—I don't suppose over 7 or 8 seconds. We just got out there when a wave came right over and knocked us all down.

Q. When the wave knocked you down, what did you strike?

A. I had hold of one of the lines tied to the mooring line. The wave knocked me down on the deck on my stomach, and somehow I turned

around and I flew up,—when the wave went back out again I hit the underpart of the gun tub. Then I came down on the deck again on my back. There were three different objects that came down on top of me. What they were I don't know."

The appellant laid on some old ropes in the gun crew's quarters, his leg was black and blue and there were two welts across his back; he was practically unconscious (Tr. 18). At about 4:30 P.M. (approximately three hours later), the crew managed to make it back to the midship house (Tr. 18), the appellant being carried by two other men (Tr. 18, 74, 84, 92).

Thereafter appellant stayed in his bunk until the ship arrived at Yokohama approximately a week later (Tr. 19) where he saw an Army doctor who told him he had several broken arteries in his leg and that his leg was bleeding inside and this blood evidently caused poison to his system which would have to slosh away. This doctor told him there was nothing much he could do for him (Tr. 20). Thereafter, as the vessel went from Yokohama to Saipan appellant still stayed in bed (Tr. 21). His leg was black and blue and his back and hip hurt him (Tr. 21). His left leg was swelled up half again as large as his right leg (Tr. 21), and was black and blue from his ankle to his knee. At Saipan his leg was bandaged by an Army doctor's orderly (Tr. 22). The ship was at Saipan approximately two weeks when it left for Hong Kong (Tr. 23). Half way to Hong Kong appellant was ordered to stand his wheel watches (Tr. 24); (we assume that the court will take judicial notice that the seaman's duty of standing wheel watch consists of

three tours of duty in a 24-hour period of an hour and 20 minutes each of standing or sitting on a stool at the wheel and steering according to the directions of an officer in attendance). He did no other work as did the other seamen (Tr. 24).

He arrived back in the United States on August 3, 1947 at which time his back bothered him and when he walked as much as 10 or 12 blocks his leg would swell and become discolored (Tr. 25). In October, 1947, he tried working on a railroad thirty miles outside Seattle and worked about 6 days but could not continue that work because his leg would swell and become discolored (Tr. 25, 26, 27). In July of 1948 he went to Livingston, Montana (Tr. 27) where his brother lives (Tr. 26) and attempted to work in the hay fields running a tractor, mowing and stacking, but he couldn't do that type of work because of his back (Tr. 27). At the time of trial in August, 1948 he felt he was capable of doing light work, his leg seemed fairly well but his back continued to bother him (Tr. 28).

In connection with this recited history it is important to note that the appellant was reared an orphan, acquired only a fourth grade education (Tr. 5, 6) and has never done anything but manual labor all of his life (Tr. 28). He has never before suffered any injury or major illness; has never been off work from any disability (Tr 27, 28).

The employer elicited from appellant on cross-examination that he has been affected with nervousness all of his life (Tr. 67) and it is clear from a

study of the testimony that the shock to his nervous system because of this experience and his injuries has been considerable.

The chief mate who testified on behalf of the respondent-appellee in large measure corroborated the testimony of the appellant as to the extent of his injury and the treatment he received (Tr. 107, 108), testifying that Menefee did no work at all for approximately a month after his injury and thereafter he kept him on "light work" as long as he was on the vessel, which was until July 2, 1947 (Tr. 108-109). The purser testified that Menefee did perform his full duties sometime after leaving Saipan (Tr. 149). The purser diagnosed his condition as a "very severe bruised leg" (Tr. 143) and testified that Menefee was on crutches when the vessel arrived at Saipan stating "when we first arrived (meaning at Saipan) he was only able to hop around on crutches—it wasn't advisable for him to walk more than was absolutely necessary."

The testimony of the chief mate and purser was given by deposition.

The appellant's monthly base pay is shown in Libellant's Exhibit I, to be approximately \$159.00 per month, and a seaman, of course, receives board and lodging of the approximate value of \$100.00 a month.

At the conclusion of counsel's argument the court filed a written decision (Tr. 17) which reads as follows:

"THE COURT: When I first read that state-

ment on page 2 of the advance sheet of the Appellate Court's decision, as follows:

“‘* * * This is not 1849, when captains and courts felt that sailors must face any exposure and keelhauling and thumb tricing enforced obedience,’

“I was very much surprised, because the evidence in the case at the former trial had not convinced me that the injury of the libelant in this case was anything more than a flesh injury. There were no bone injuries nor injuries connected with bones or muscles likely to be seriously disabling for any considerable length of time. However that may be, the majority members of the Appellate Court in their opinion have seen fit to use the above-quoted words ordinarily in bygone days used to describe some colorful or sensational saga of the sea.

“This Court has reconsidered the evidence and the arguments of counsel on the evidence and concerning the inflated value of the dollar *and the Appellate Court's view of the case.*

“Considering the evidence and argument as to lost wages, his pain and suffering, the length of time following the accident during which the libelant was not regularly doing his work on board the ship, the nature of the injury and the evidence as to its interference with libelant's labors, his work record as disclosed by the evidence, and considering everything proper to consider, the Court finds, concludes and decides that the sum of seven hundred fifty dollars (\$750.00) would be a just and reasonable compensatory sum to be allowed libelant for all of his damages, special and general, sustained by him as a proximate result of the accident.

“Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 18, 1949.

“MILLARD P. THOMAS, Clerk.

“By KOERNER, Deputy.”

(Emphasis supplied)

SPECIFICATION OF ERRORS

The appellant hereby assigns error in the decree of the District Court in the above entitled action, dated August 23, 1949, as follows:

(1) The Court erred in finding and concluding that the appellant had been damaged only in the sum of \$750.00.

(2) The Court erred in failing to find and conclude that the appellant had been damaged in a sum greatly in excess of \$750.00.

THE APPELLANT WAS ENTITLED TO AN AWARD GREATLY IN EXCESS OF THE SUM FIXED BY THE TRIAL COURT.

This argument is addressed to both assignments of error, which are as follows:

(1) The Court erred in finding and concluding that the appellant had been damaged only in the sum of \$750.00.

(2) The Court erred in failing to find and conclude that the appellant had been damaged in a sum greatly in excess of \$750.00.

In the first instance it is undisputed that the appellant's injuries arose from an extremely violent occur-

rence. While holding onto a line he was knocked down on the deck and up against the gun tub and back down on the deck and three different objects fell on top of him (Tr. 17). He complained immediately of his injuries and the other members of the crew solicitously looked after him and had him rest on a pile of old ropes in the gun crew's quarters until he could safely be moved to his quarters. It is also undisputed that he required carrying to his quarters.

It is also undisputed that except for going to meals, etc., he was required to stay in his bed for a month and that thereafter for some time he was around on crutches.

These undisputed facts refute the statement of the trial court that the injury in this case was not "seriously disabling for any considerable length of time" (Ap. 17). Of course, bone injuries are more sensational because they are susceptible to the proof of the X-ray. Likewise, muscular and tendonous injuries can be examined and repaired by surgery. Medical science can yet do nothing toward remedying injuries to the smaller or capillary blood vessels and the smaller nerve branches. These nature must correct and repair. Since we can not see this injury either by pictures or by surgery we can judge its severity only by external manifestations. It seems apparent even to a casual observation that a bruise which requires one month of being bedfast should be classed as an injury that is "seriously disabling."

The chief mate corroborated the appellant's testimony that he thereafter was on light duty for six months, the appellant testifying that by light duty he meant that he only stood his wheel watch, and did none of the other work which is customarily done about the ship. Although this was in some measure contradicted by the purser since both the purser and the chief mate testified by deposition we submit that the greater weight should be given to the chief mate's testimony inasmuch as he is the officer directly in charge of the men and in a better position to know exactly what duties they are performing. We have at least, then, corroborated testimony that the appellant was still partially disabled at the time he left the vessel, more than five months after the date of his injury.

The evidence of appellant's condition thereafter is contained in his own testimony and was to the effect that in October, 1947, he had tried to work on the railroad and was unable to do so because after long standing his leg would swell and that just prior to the trial, sometime in July of 1948, he had tried to do hard manual labor on the farm and was unable to do so because of his back and leg. He further testified that at the time of trial his leg felt pretty good and he felt he could at least do light work.

Although the appellee took and used appellant's oral discovery deposition and had full opportunity for complete medical examination to disprove these statements of appellant, if false, no evidence was produced by the appellee in disproof of these statements.

Other adjudications are, of course, of very little assistance in such cases since the amount to be award-

ed depends upon so many different factors. In this case it is clear that the injury and suffering of the appellant was greatly increased by his nervous instability, his lack of education and understanding and his lack of experience in any gainful employment other than hard manual labor. Thus, in *Walsh's Case*, 63 Fed. Supp. 421, 1945 A.M.C. 747, 152 F.2d 46, 1945 A.M.C. 1513, the trial court awarded the libelant \$13,000.00, of which \$1,300.00 was for pain and suffering. The evidence showed that part of the injury was due to congenital weakness in the injured member. In raising the award for pain and suffering to \$4000.00 the Court of Appeals said:

“Probably the damaged condition of Walsh’s spine was in part congenital; but there can be no doubt that, however little the fall might have injured the spine of a normal man, it injured Walsh enough to subject him to a long and severe ordeal, and, in accordance with the general doctrine, the respondent must completely indemnify him, regardless of his idiosyncrasy. The *Jefferson Myers*, 45 F.2d 162; *Pieczonka v. Coleman Company*, 89 F.2d 353, 357; *Oliver v. Yellow Cab Co.*, 98 F.2d 192.”

By way of further rather startling contrast to the award in this case are three recent maritime awards by district judges in other districts. In *Forbes v. U.S.*, 1948 A.M.C. 1300, a truck ran over the libelant’s toe. He was totally incapacitated for four months and there was evidence of some permanent disability in the toe. The libelant was awarded \$10,000.00.

In *Mason v. U.S.*, 1948 A.M.C. 1052, the libelant’s back was injured but there was no permanent injury.

He was awarded his wages, his medical bills and \$6250.00 for pain and suffering.

In *Portel v. U.S.*, 1949 A.M.C. 487, the plaintiff suffered first, second and third degree burns. He spent 23 days in the hospital and was thereafter in bed at home for three weeks. He had normal recovery except for some scars on his body but there were none on his face. He was awarded \$650.00 for lost wages and \$15,000.00 for pain and suffering.

If the appellant's testimony be given any credence at all and it is important to note that he has been corroborated in every other important aspect of the case, he had lost in excess of \$3000.00 past wages and subsistence at the time of the trial in August, 1948. The trial court made no finding with reference to this claimed loss. The trial court nowhere in the findings of fact, conclusions of law, decree, or decision commented either favorably or unfavorably on the testimony of the appellant, but did, in his written decision which was filed, comment upon the Court of Appeal's view of the case. Examine the first sentence of the trial court's decision wherein it is said:

“When I first read that statement on page 2 of the advance sheet of the Appellate Court's decision, as follows:

“* * * This is not 1849, when captains and courts felt that sailors must face any exposure and keelhauling and thumb tricing enforced obedience.’

“I was very much surprised, because the evidence in the case at the former trial had not convinced me that the injury of the libelant in

this case was anything more than a flesh injury.” The two portions of the sentence are in themselves inconsistent because the quoted portion of this court’s opinion makes no reference at all to the severity of appellant’s injuries. That part following the word “because,” therefore, has no relation to the first part.

In the next paragraph the court states that in reconsideration of the case he has considered “the Appellate Court’s view of the case.” This court did not in any manner or way consider or treat of the question of the injuries or the damages of the appellant in its previous decision. It remanded the case to the trial court for his free and untrammelled opinion, unguided by any hint or suggestion in the Court of Appeal’s decision as to what should be done in this regard. In what manner did the trial court then consider “the Appellate Court’s view of the case” in assessing the damages? If the trial court was influenced in any way by this court’s previous decision in assessing the appellant’s damages he committed an error of law in applying the standard by which the damages are measured. To bring that point into clearer focus, it is elementary to say that the trial court should apply the same test in awarding damages as he would instruct a jury to apply. If these damages had been fixed by a jury, an instruction by the court to that jury to the effect that they were to consider the previous decision of the Court of Appeals in this case in fixing the damages would be clearly in error. Since the trial court has determined the damages with reference to an immaterial factor the appellant respectfully requests that this court

disregard the trial court's conclusion as to damages and assess the damages in such amount as based upon the evidence in the case would fully and fairly compensate the appellant for his lost wages, for pain and suffering and for future partial disability, if any.

Appellant believes that the following language of this court in the former decision in this case is perfectly appropriate to this situation:

“As stated in *Langes v. Green*, 282 U.S. 531, 537, citing *Watts, Watts N Co. v. Unione Austriaca*, 248 U.S. 9, 21, ‘This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice *may at this time* require;’ and ‘the rule is more insistent, because, in admiralty, cases are tried *de novo* on appeal.’ *Rice Growers v. Roderinktiebolaget Frode*, 171 F.2d 662, 663 (Cir. 9). Cf. *Petterson Lighterage, etc. Cd. v. New York Central R. Co.*, 126 F.2d 992 (Cir. 2).”

CONCLUSION

The appellant respectfully requests that this court modify the trial court's award by increasing the amount to a sum reasonably sufficient to compensate the libelant for the damages he sustained.

Respectfully submitted,

J. DUANE VANCE,
BASSETT & GEISNESS,
Proctors for Appellant.

In The United States
Court of Appeals
For the Ninth Circuit

DALE MENEFEE,

Appellant,

vs.

W. R. CHAMBERLIN CO., a corporation,

Appellee.

From the United States District Court for the
Western District of Washington,
Northern Division

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,

EDW. S. FRANKLIN,

Proctors for Appellee.

603 Central Building,
Seattle 4, Washington.

FILED

FEB 16 1950

PAUL P. O'BRIEN,
CLERK

In The United States
Court of Appeals

For the Ninth Circuit

DALE MENEFEE,

Appellant,

vs.

W. R. CHAMBERLIN CO., a corporation,

Appellee.

**From the United States District Court for the
Western District of Washington,
Northern Division**

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,

EDW. S. FRANKLIN,

Proctors for Appellee.

603 Central Building,
Seattle 4, Washington.

INDEX

	Page
Statement of the Case.....	1
Severity of Appellant's Injury.....	6
Testimony Justifying Award.....	9
Authorities Justifying Award.....	10

TABLE OF CASES

	Page
<i>Cresey v. Staples Coal Company</i> , 1944 A.M.C., 1498.....	11
<i>Halligan v. Waterman Steamship Corporation</i> , 1938 A.M.C., 871.....	10
<i>Miller v. United States</i> , 1940 A.M.C., 475.....	11
<i>National Bulk Carriers v. Hall</i> , 152 F. (2d) 658, (5 CCA, 1945).....	10
<i>Serio v. Steamship Ivan</i> , 1944 A.M.C. 409.....	11
<i>Tawada v. United States</i> , 162 F. (2d) 615.....	11

In The United States Court of Appeals

For the Ninth Circuit

DALE MENEFEE,

Appellant,

vs.

W. R. CHAMBERLIN CO., a corporation,

Appellee.

No. 12124

**From the United States District Court for the
Western District of Washington,
Northern Division**

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This appeal presents only the question as to the correctness of the decree of the lower court awarding appellant Menefee \$750.00 for damages as the result of a bruised right leg sustained by him at sea on January 23, 1947 when a member of the crew of the SS "ROBERT PARROT", operated by appellee. Appellant was injured when a wave washed over the vessel throwing him to the deck, under circumstances deemed by this court to constitute negligence of the vessel owner (1949 A.M.C. 1388, opinion June 23, 1949).

He was treated at sea by Purser/Pharmacist's Mate

Brown until the vessel reached Yokohama four days later on January 27, 1947, where his injuries were diagnosed by Lt. Waterman, an Army doctor, as a severe bruise of the right leg. However, it was the opinion of Dr. Waterman that appellant could resume his usual duties in four or five days time thereafter. (Tr. 148) At Saipan, the next port of call, appellant was also seen by an Army doctor, (Tr. 149) and resumed his regular duties as an ordinary seaman while the vessel was en route from Saipan to Hongkong some indeterminate time between February 4th and February 26th, 1947.

Appellant testified as follows:

“Q. When did you return to your sea duties, Mr. Menefee?

“A. Between Saipan and Hongkong.

“Q. You arrived in Hongkong, the sailing list shows, on February 26th, and you left Saipan February 4th, so that it was some time in that interval?

“A. Yes.

“Q. And you returned to your regular sea duties thereafter, did you?

“A. Yes.

“Q. And you had no further treatment at any time because of the condition of your back or your leg, after you left Saipan?

“A. No, I didn't have any more treatment.

“Q. You stopped at several ports, didn’t you, before you reached Cape Town, from the time you left Hongkong?”

“A. I stopped at New Guinea, Durbin, Madagascar and Reunion Island.” (Tr. 48-49)

Purser/Pharmacist’s Mate Brown testified similarly.

“Question: You have already testified to the fact Mr. Menefee worked during that period of time —Saipan to Hongkong.

“Answer: Yes, that’s right.

“Question: After the vessel left Hongkong, where was the next port of call?”

“Answer: Lae, New Guinea.

“Question: Did Mr. Menefee carry out his duties between Hongkong and Lae, New Guinea?”

“Answer: Yes.

“Question: What was the next port of call?”

“Answer: Durban, South Africa.

“Question: Between Lae and South Africa, did Menefee carry out his duties as an A. B.”

“Answer: Yes, he seemed completely recovered and made no complaint during that time.

“Question: And, the next port of call after Durban, South Africa, was what port?”

“Answer: Tamatave, Madagascar.

“Question: During that portion of the voyage did he make any complaint?

“Answer: No, he didn’t.” (Tr. 149-150)

Chief Mate Kloppenstein was incorrect in his statement that Menefee was off duty for a month after his accident. (Tr. 109) He testified, however, that Menefee worked continuously after Saipan until the vessel reached Cape Town July 2, 1947, performing his usual sea duties. (Tr. 109)

On cross-examination Chief Mate Kloppenstein further testified as follows relative to appellant’s physical activities between the time of his return to work en route to Hongkong in February, 1947, and the arrival of the vessel in Cape Town, July 2, 1947:

“Q. But, you did not think it wise to give him any heavy work as long as he was on the vessel after the accident?

“A. Menefee just went ahead and did the work of an ordinary seaman at the time.

“Q. But, you didn’t give him — you just gave him light work?

“A. Whenever I had an opportunity, I have given him the light jobs.” (Tr. 136-137)

Appellant testified as follows relative to his physical condition at Hongkong:

“A. Well, the swelling had gone down. The discol-

oration of it had disappeared. The leg seemed to have been fair but it was my back that was bothering me. I seemed to have paralysis on my hip and my back up to my shoulder." (Tr. 24)

The vessel, after leaving Hongkong, stopped at a number of Asiatic and African ports before arriving in Cape Town, but appellant did not ask for or obtain any medical treatment ashore.

Appellant missed the vessel at Cape Town, July 3, 1947. He later signed on the SS "ROBIN GOODFELLOW" as an ordinary seaman, and returned to New York, where he was discharged August 23, 1947 (Tr. 33)

The trial of the libel was had August 17th and August 18th, 1948. At no time since his arrival in the United States a year earlier had appellant sought medical advice or treatment from any Marine Hospital in the United States because of any claimed complaint with his right leg or back, (Tr. 64-65) nor had he sought private medical attention. He was complaining at the trial of ill health, due to nervousness which he admitted had always bothered him. (Tr. 67) He also complained that his eyes were bothering him and he was dizzy. (Tr. 67)

Appellant produced no medical or expert testimony at the trial to corroborate his claim of pain, suffering or temporary or total incapacity to work as the result of his accident.

SEVERITY OF APPELLANT'S INJURY

Appellant's claim of the alleged seriousness of his injury and its disabling effects finds no support in the record.

The testimony preponderantly establishes that appellant's injury was superficial in character, being a bruised leg which required a limited period of rest until recovery was obtained. By remaining off his leg until healed, appellant minimized any discomfort resulting from the injury. Bruises are incidents of everyday human experience attended by a minimum of pain and suffering. They heal without medication with rest.

The record likewise refutes Menefee's assertion that he was "bed fast" for a month following his injury of January 23, 1947. He testified he returned to his work as ordinary seaman between February 4, 1947, when the vessel left Saipan, and February 26, 1947, when it reached Hongkong. At Yokohama and Saipan he went ashore several times for medical treatment. His condition at Saipan as to physical activity was described as follows by Purser/Pharmacist's Mate Brown:

"Answer: When we first arrived, he was only able to hop around on crutches — it wasn't advisable for him to walk more than was absolutely necessary." (Tr. 148)

The libel which was filed November 23, 1947 (Tr.

2,3) alleges only by way of injuries “ a crushing of the right lower leg.” At the trial of the case, appellant made some complaint of a back injury (Tr. 28) which was presently disabling and he intimated was a sequence of his accident. However, the testimony of all of the witnesses except appellant in the trial of the case established that the only injury he sustained was a bruise to his right leg. Such was the testimony of Chief Mate Kloppenstein, Purser/Pharmacist's Mate Brown, set out above, and appellant's witnesses, Englund (Tr. 73-75) and Jacobson. (Tr. 84)

The testimony of Purser/Pharmacist's Mate Brown and Chief Mate Kloppenstein is particularly convincing and persuasive. Kloppenstein had appellant under constant supervision after his return to work after his accident in February, 1947. He states Menefee did the work of an ordinary seaman thereafter although if he had an opportunity he would give him light work. (Tr. 137) This is readily understandable since Menefee was only an ordinary seaman with limited sea experience, and his work would naturally be restricted to standing a watch and doing deck painting, and lighter work of a similar character.

Purser/Pharmacist's Mate Brown testified after returning to his regular work as ordinary seaman, Menefee appeared completely recovered and made no further complaint as to his physical condition for the balance of the trip. (Tr. 150) Because of his medical training and experience and familiarity with Menefee's

injury Brown's testimony deserves special consideration.

We believe the record before the able and conscientious trial Judge adequately supports his conclusions as stated in the court's decision, "there were no bone injuries or injuries connected with bone or muscles likely to be seriously disabling for any considerable length of time," (Tr. 17) and he was eminently correct in characterizing Menefee's injury as "a flesh injury."

In evaluating Menefee's testimony as to the nature and extent of his injuries, the court was required to determine his credibility which we believe was considerably impaired by a discredited explanation as to the circumstances under which he missed the vessel at Cape Town July 2, 1947 (his second cause of action for alleged abandonment by the vessel was dismissed and no appeal taken therefrom). (Tr. 51-64)

TESTIMONY JUSTIFYING AWARD

The following record facts justified the court in concluding that Menefee's injuries were temporary in character and caused him no undue pain or suffering:

1. Menefee's injury was a bruised leg.
2. He kept off his injured member for a period of two or three weeks, thereby minimizing any pain to the injured member.
3. He returned to his regular work two or three weeks after his accident, and worked steadily without complaint to anyone from the middle of February, 1947 until he missed the vessel in Cape Town July 3, 1947.
4. After his return to work, he sought no medical treatment while aboard the vessel, although it was available to him both from the Purser and at various Asiatic and South African ports.
5. He arrived in New York August 23, 1947 and up to the time of the trial of his libel August 17, 1948, he had not consulted a physician nor availed himself of the free medical service at any United States Marine Hospital.
6. Menefee offered no medical or expert testimony on the trial of his case to corroborate his complaints of continuing disability.
7. At the trial a year later he testified that he was then suffering from physical conditions unrelated to his accident.

AUTHORITIES JUSTIFYING AWARD

To justify his claim for an increased award, appellant cites several admiralty cases in which awards were made for pain and suffering in excess of that allowed in this case. An examination of those cases will reveal that they all involved extremely serious injuries, with prolonged operative treatment and hospitalization, with permanent disabling aftermaths and extended periods of pain and suffering. They bear no relation to the facts of this case.

In *National Bulk Carriers v. Hall*, 152 F. (2d) 658, (5 CCA, 1945) the court said:

“There is no standard for the measurement of damages for pain and suffering.”

In that case the seaman lost 87 days time as the result of a hernia operation and was awarded \$250.00 for pain and suffering.

In the case of *Halligan v. Waterman Steamship Corporation*, 1938 A.M.C. 871, the injury, a sprained ankle, was comparable to the injury at bar. Liability was found and United States District Judge Coxe of the Southern District of New York said:

“With respect to the injuries, I doubt whether the libellant sustained anything more than a sprained ankle. The X-ray photographs show no broken bones, and the ankle swelling appears to be little more than might reasonably be expected to accompany a sprain. Moreover, the libellant has been employed during the greater part of the time since the accident. I think that \$650 is entirely

adequate both for the injuries and for maintenance and cure.”

In *Miller v. United States*, 1940 A.M.C. 475, the seaman was in the hospital three months for a back injury, and damages for pain and suffering were awarded in the amount of \$450.00.

In *Serio v. Steamship Ivan*, 1944 A.M.C. 409, the sum of \$800.00 was awarded a seaman for pain and suffering as the aftermath of a severe fall and hernia operation.

For a five week disability where the seaman was struck in the head by an improperly placed stern line, District Judge Wyzanski awarded the libellant \$750.00 in the case of *Cresey v. Staples Coal Company*, 1944 A.M.C. 1498.

The above cases set a pattern for the award of damages for pain and suffering to injured seamen where the injury is temporary in character and comparable to Menefee's injury.

In making the award for pain and suffering the court took special cognizance of the current inflated value of the dollar as well as all other proper elements to be considered in fixing damages. (Tr. 17)

The findings and decree of the lower court reaches this court encased in their usual armor of correctness.

This court said recently in *Tawada v. United States*, 162 F. (2d) 615:

“In an appeal in admiralty, where ‘a substantial part of the evidence was heard in open court,’ the ‘correct rule’ is that the findings of the trial court ‘are accompanied with a rebuttable presumption of correctness.’ *Thomas v. Pacific S.S. Lines, Ltd.*, 9 Cir., 84 F. 2d 506, 507, 508; *The Pennsylvanian*, 9 Cir., 149, F 2d 478, 481. And, ‘where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.’ ”

In that case, as in this, the District Court rejected libellant’s testimony, and this court refused to disturb the findings of the District Court in view of the opportunity of the trial court to pass upon the credibility of libellant.

We respectfully submit that the award of damages made appellant for pain and suffering was adequate and liberal in amount in view of the character of the injuries he sustained and the testimony relative thereto and this court should not disturb the award of the District Court.

Respectfully submitted,

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,

Proctors for Appellee.

No. 12433

United States
Court of Appeals
for the Ninth Circuit.

FIRST NATIONAL BENEFIT SOCIETY,
a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

APR - 5 1950

PAUL P. O'BRIEN,

CLERK

No. 12433

United States
Court of Appeals
for the Ninth Circuit.

FIRST NATIONAL BENEFIT SOCIETY,
a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Service by Mail.....	80
Amended Petition.....	4
Exhibit A—Notice of Deficiency.....	12
Answer to Amended Petition.....	17
Appearances	1
Certificate of Clerk.....	83
Decision	75
Designation of Portion of the Record to Be Certified, Titled in the Tax Court of the United States.....	82
Docket Entries.....	2
Entry of Appearance.....	17
Filed Memorandum in Re: Bond.....	76
Memorandum Findings of Fact and Opinion...	55
Findings of Fact.....	55
Opinion	64
Minutes of Proceedings.....	22
Notice of Filing Petition for Review.....	79

INDEX	PAGE
Notice of Setting Proceedings for Hearing— Circuit Calendar.....	21
Petition for Review.....	76
Petitioner's Designation of Portions of the Record to Be Printed as the Record on Review..	88
Proceedings	23
Request for Preparation for the Certification of the Record.....	82
Service of Answer and Notice of Place of Hearing	20
Statement of Points to Be Relied Upon on Appeal	84
Stipulation	91
Stipulation of Facts.....	51
Witnesses, Petitioner's:	
Reese, M. C.	
—direct	29
—cross	36
—redirect	43
—recross	45
Harber, D. A.	
—direct	47
—cross'	49

APPEARANCES

For Petitioner:

ROBERT R. WEAVER, Esq.

For Respondent:

L. C. AARONS, Esq.

Docket No. 14661

FIRST NATIONAL BENEFIT SOCIETY, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1947

June 9—Petition received and filed. Taxpayer notified. Fee paid.

June 9—Request for hearing at Los Angeles, Calif., filed by taxpayer. 6/23/47 Granted.

June 12—Copy of petition served on General Counsel.

July 3—Amended petition filed by taxpayer. Copy served 7/8/47.

July 22—Entry of appearance of Robert R. Weaver, as counsel, filed.

Aug. 27—Answer to amended petition filed by General Counsel.

Sept. 2—Copy of answer served on taxpayer. Los Angeles, Calif., calendar.

1948

Sept. 23—Hearing set November 29, 1948 at Los Angeles, California.

1948

Nov. 30—Hearing had before Judge Van Fossan on merits. Stipulation of facts with joint exhibits 1-A, 2-B and 3 thru 9, attached thereto, filed at hearing. Briefs due 1/14/49. Replies due 1/31/49.

Dec. 21—Transcript of hearing 11/30/48 filed.

1949

Jan. 12—Brief filed by taxpayer. 1/18/49 Copy served.

Jan. 17—Motion for leave to file the attached reply brief, brief lodged, filed by General Counsel. 1/18/49 Granted.

Feb. 1—Motion for leave to file the attached brief, reply brief lodged, filed by General Counsel. 2/2/49 Granted.

Feb. 3—Motion for leave to file the attached reply brief, reply brief lodged, filed by taxpayer. 2/3/49 Granted.

Feb. 4—Copy of motion and reply brief served on General Counsel.

Sept. 13—Memorandum findings of fact and opinion rendered, Judge Van Fossan. Decision will be entered for the respondent. Copy served.

Sept. 13—Decision entered. Judge Van Fossan. Div. 9.

Nov. 29—Bond in the amount of \$2,271.66 approved and ordered filed.

1949

Nov. 29—Petition for review by U. S. Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Nov. 29—Proof of service filed by General Counsel.

Nov. 29—Designation of record for the complete record and all the proceedings and evidence filed by taxpayer.

Nov. 29—Affidavit of service by mail of designation of record filed. (Also request for preparation.)

The Tax Court of the United States

Tax Court Docket No. 14661

FIRST NATIONAL BENEFIT SOCIETY, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:90D:PAK) dated the 14th day of March, 1947, and as a basis for its proceeding alleges as follows:

I.

1. The Petitioner is a Corporation, organized and existing under and by virtue of the laws of the State of Arizona, and during the year 1939, the fiscal tax year involved herein was authorized to and was transacting business in said State under the provisions of the Arizona laws 1937, Ch. 36 #1, p. 107 (Sections 53-601 to 53-622 1939 Ariz. Code Anno.).

2. The return for the period herein involved was filed with the Collector for the District of Arizona and involves Federal Income Taxes.

3. The Post Office address of Petitioner is 807 West Washington Street, Phoenix, Arizona.

II.

1. The amount of the deficiency determined by the Commissioner is \$1,135.83 for income tax for the year 1939. The Petitioner's Return was filed with the Collector for the District of Arizona, and covered its income taxes for the year ending December 31, 1939.

2. The Notice of deficiency, a copy of which is hereto attached, marked Exhibit A, was mailed to the Petitioner on March 14, 1947.

III.

Assignment of Errors

The determination of the tax set forth in said

Notice of Deficiency is based on the following errors:

1. The Commissioner determined that compensation due M. C. Reese, accruing under an employment contract, during the year 1939, but not paid during that year was not deductible. Such determination was erroneous for the reason that although Petitioner filed its return on a cash basis, the Commissioner for the purpose of determining Petitioner's taxes for the said year actually accrued claims, where deaths had been reported but were paid during the following year, and this determination leaves the calculation partially on an accrual basis and partially on a cash basis.

2. The Commissioner determined that the sum of \$4,518.71 was not deductible from Petitioner's income during the said period. Such determination was erroneous, for the reason that whether Petitioner is to be classified as a Life Insurance Company under the Provisions of Sec. 201 of the Internal Revenue Act, as it contends, or to be classified as an Insurance Company other than life, under the provisions of Sec. 207 of said act, as it is classified by Commissioner it would be entitled to a deduction, even under Sec. 207 of the Internal Revenue Act as of that year from the net addition required by law to be made within the taxable year to reserve funds. (Sec. 207) (c) (1) (A) Internal Revenue Act 1939).

3. The determination of the deficiency was also

in error, for the reason that although he had classified the Petitioner under 207 of the Internal Revenue Act as effective during the year 1939, he did not deduct those funds created by premium deposits, for the payment of expenses and losses as provided in said Section (Section 207) (c) (3).

4. The Commissioner erred in its classification of the Petitioner for the reason that the said Petitioner was during the year 1939 a Life Insurance Company, more than fifty percentum of its reserves being held for the fulfillments of its life insurance contracts.

STATEMENT OF FACTS

Preliminary Statement

1. Referring to assignments of Error No. 1, the Petitioner filed its income tax return for the year 1939 made out on a cash basis. However, the Commissioner in determining the amount of Petitioner's tax liability, chose to accrue the claims paid in the early part of 1940 where the deaths had occurred in the latter part of 1939. This procedure had been followed in regard to Petitioner's 1938 income taxes, thus placing the taxpayer in that regard on an accrual basis. This accrual of such items coupled with a failure to accrue the item of \$3,675.41 payable to M. C. Reese during that year but not paid does not furnish the true net income figure for the purpose of levying an income tax. Further it does not give the true balance as between those reserves

held for the fulfillment of Petitioner's Life Insurance contracts for the purpose of classification. The Commissioner in his notice of deficiency mailed to petitioner on March 14, 1947, and as an explanation of his determination makes the following statement:

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated April 6, 1942 to your protest dated May 1, 1942 and to the statement made at conferences held.

Your contention that you should be classified as a life insurance company under the provisions of section 201 of the Internal Revenue Code is denied. It is held that you are a mutual insurance company subject to tax under the provisions of section 207 of the Internal Revenue Code.

With the above as the basis for the deficiency, the following statements referring to the above assignments of error, #1:

1. After the Commissioner had made an audit accruing the items above referred to, an audit was made by Joe L. Schmitt, Jr., who is the chief examiner for the Arizona Insurance Department, accruing the other items on petitioner's books in like manner, which audit was forwarded to the Commissioner on June 9, 1946.

2. Referring to assignments of Error No. 2, the Arizona law under which Petitioner was transacting its business during the year 1939, requires a deposit with the State Treasurer (Sec. 53-605 1939 Ariz. Code Anno.) which under the provisions of

Section 207 of the Internal Revenue Act is a deductible item for the year in which it was deducted, even if it did not classify as a life insurance reserve for the purpose of classification of Petitioner's business for taxation purposes. The amount so deposited during the year 1939 was \$4,518.71, which amount was not allowed as a deductible item by the Commissioner in determining the tax deficiency herein referred to.

3. Referring to assignments of Error No. 3, in determining the said deficiency, the Commissioner classified the Petitioner under Section 207 of the Internal Revenue Code, and although he sets up in one item an expense already incurred, (the amount due M. C. Reese), he not only did not deduct it for the purpose of his determination but he made no allowances for it or for any expense under the provisions of Section 207 (c) (3) of the Internal Revenue Code. The Petitioner is a Mutual, Non-Profit organization and is not authorized by law to collect premiums (and does not collect them) for any other purpose than that of paying expenses and losses, and building the necessary reserves for the fulfillment of its *contacts*.

4. Under the law of the State of Arizona and the operations of the Petitioner together with the condition of its reserves, Petitioner should be classified as a life insurance company under the provisions of Section 201 of the Internal Revenue Code, as it existed during the year 1939 more than fifty percentum of its reserves were held for the fulfill-

ment of its contracts, the procedure adopted by the Commissioner; that is, the accrual of claims where deaths had occurred late in December, 1939 and paid early in the year, 1940, together with the failure to accrue expense items already incurred, does not give the true balance of reserves held by petitioner for the purpose of determining whether or not more than fifty percentum of its reserves were held for the fulfillment of its life insurance contracts. Petitioner does nothing but a life insurance business. Its reserves are calculated on a basis equivalent to the American experience table of mortality plus $3\frac{1}{2}\%$. Its mortuary reserve is held under requirements of the law of the State of Arizona and rules of the corporation commission authorized thereby. The reserve so calculated and set aside by the corporation for the fulfillment of its life insurance contracts and used for no other purpose, constitute more than fifty percentum of its total reserve funds.

Wherefore, Petitioner prays that this court may hear this proceeding and set aside and annul the purported deficiency or grant such other relief as may be found proper.

FIRST NATIONAL BENEFIT
SOCIETY,

By /s/ M. C. REESE,
President.

807 West Washington St.,
Phoenix, Arizona.

State of Arizona,
County of Maricopa—ss.

M. C. Reese, being first duly sworn, deposes and says: I am the President of the First National Benefit Society, the petitioner in whose behalf the foregoing petition is filed and I am duly authorized to verify the foregoing petition; that I have read the foregoing petition, and am familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those I believe to be true.

/s/ M. C. REESE.

Subscribed and sworn to before me this 30th day of June, 1947.

[Seal] /s/ K. ALMIRA HAMMOND,
Notary Public in and for the County of Maricopa,
State of Arizona.

My Commission Expires Sept. 30, 1950.

EXHIBIT A

Form 1279

SN-IT-7

Treasury Department

Internal Revenue Service

417 South Hill Street

Los Angeles 13, California

Office of

Internal Revenue Agent in Charge

Los Angeles Division

LA:IT:90D:PAK

Mar. 14, 1947

First National Benefit Society

First National Bank Building

Phoenix, Arizona

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1939 discloses a deficiency of \$1,135.83, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return (x) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSE D. NUNAM, JR.,

Commissioner,

By GEORGE O. MARTIN,

Internal Revenue Agent
in Charge.

Enclosures:

Statement

Form of Waiver

Statement

LA:IT:90D:PAK

First National Benefit Society

First National Bank Building

Phoenix, Arizona

Tax Liability for the Taxable Year

Ended December 31, 1939

Income Tax

Liability \$1,135.83

Assessed \$—0—

Deficiency \$1,135.83

In making this determination of your income tax liability, careful consideration has been given to the

14 *First National Benefit Society vs.*

report of examination dated April 6, 1942, to your protest dated May 1, 1942 and to the statements made at conferences held.

Your contention that you should be classified as a life insurance company under the provisions of section 201 of the Internal Revenue Code is denied. It is held that you are a mutual insurance company subject to tax under the provisions of section 207 of the Internal Revenue Code.

Adjustment to Net Income

Net Income as disclosed by return.....	None
Additional income:	

(a) Net income as disclosed by books.	\$6,883.83
---------------------------------------	------------

Net income adjusted	\$6,883.83
---------------------------	------------

Explanation of Adjustment

(a) An examination of your books and records discloses taxable net income for the year 1939 in the amount of \$6,883.83 as compared with the amount of \$1,965.37 which you contend is correct on the basis of the audit report submitted by you. The difference amounting to \$4,918.46 is reflected in the following items:

Items deducted in computing net income shown in your audit report not deductible for income tax purposes:

(a) Compensation under M. C. Reese

Contract	\$3,675.41
----------------	------------

(b) Amount deposited with State

Treasurer	4,518.71
-----------------	----------

(c) Accrued Losses (claims) December
31, 1939 47.34

\$8,241.46

(d) Less: Accrued losses (claims) Decem-
ber 31, 1938 overstated in your audit
report 3,323.00

Difference as shown above.....\$4,918.46

(a) Compensation Under M. C. Reese
Contract—\$3,675.41

The amount claimed as a deduction in your audit report as compensation due M. C. Reese under an alleged employment contract amounts to \$18,075.41. The amount actually paid Mr. Reese during the year under said alleged contract amounted to \$14,400.00; the difference, \$3,675.41, is disallowed for the reason that your books and records are on the cash basis of accounting.

(b) Amount Deposited with State
Treasurer—\$4,518.71

The amount, \$4,518.71, deposited with the Arizona State Treasurer during the taxable year does not constitute additions required by law to be made within the taxable year to reserve funds within the meaning of section 207 of the Internal Revenue Code and therefore is not a proper deduction in computing your taxable net income under that section of the Act.

(c) Accrued Losses (Claims) at December 31,
1939—\$47.34

The amount of accrued losses (claims) at December 31, 1939 shown in your audit report at \$4,299.99 has been reduced to \$4,252.65. The balance, \$47.34, has not been substantiated as proven claims.

(d) Accrued Losses (Claims) at December 31,
1938—\$3,323.00

The amount of accrued losses (claims) at the beginning of the taxable year 1939, shown in your audit report at \$5,155.49, has been reduced to \$1,832.49, the amount reflected in the computation of your taxable net income for the preceding taxable year 1938 as accrued losses (Claims) at the close of that year.

Computation of Income Tax

Net income adjusted.....	\$6,883.83
Special class net income.....	\$6,883.83
Income tax:	
16½% of \$6,883.83	\$1,135.83
Correct income tax liability.....	\$1,135.83
Income tax assessed:	
Original, account No. 850002.....	—0—
<hr/>	
Deficiency of income tax.....	\$1,135.83

Copy served July 8, 1947.

Filed July 3, 1947, T.C.U.S.

[Title of Tax Court and Cause.]

ENTRY OF APPEARANCE

The undersigned, being duly admitted to practice before The Tax Court of the United States as Attorney ~~C. P. A.~~, * * * herewith enters his appearance for the petitioner in the above-entitled proceeding.

/s/ ROBERT R. WEAVER,
403-404 First National Bank
Bldg., Phoenix, Arizona.

* * * Cross out qualification
class not applicable.

Served.

Received and filed July 22, 1947.

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

I.

1. Admits that Petitioner is a Corporation, organized and existing under and by virtue of the laws of the State of Arizona, and during the year 1939, the fiscal tax year involved herein, was author-

ized to and was transacting business in said State. Denies the remainder of the allegations contained in paragraph 1 of section I of the amended petition.

2 and 3. Admits the allegations contained in paragraphs 1 and 2 of section I of the amended petition.

II.

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of section II of the amended petition.

III.

1. Admits that the Commissioner determined that compensation of M. C. Reese, under an employment contract, during the year 1939, and not paid during that year was not deductible. Denies, however, that such determination was erroneous and denies the remainder of the allegations contained in paragraph 1 of section III of the amended petition.

2. Admits that the Commissioner determined that the sum of \$4,518.71 was not deductible from petitioner's income during the said period. Denies, however, that such determination was erroneous and denies the remainder of the allegations contained in paragraph 2 of section III of the amended petition.

3 and 4. Denies the allegations contained in paragraphs 3 and 4 of section III of the amended petition.

Statement of Facts

Preliminary Statement

1. Admits that the petitioner filed its income tax return for the year 1939 on a cash basis. Denies the remainder of the allegations contained in paragraph 1 of the Preliminary Statement of Statement of Facts appearing on page 4 of the amended petition.

1 and 2. Denies the allegations contained in paragraphs 1 and 2 of the Preliminary Statement of Statement of Facts appearing on page 5 of the amended petition.

3. Admits that the Commissioner classified the Petitioner under Section 207 of the Internal Revenue Code. Denies that remainder of the allegations contained in paragraph 3 of the Preliminary Statement of Statement of Facts of the amended petition.

4. Denies the allegations contained in paragraph 4 of the Preliminary Statement of Statement of Facts of the amended petition.

IV.

Denies each and every allegation contained in the amended petition not hereinbefore admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. A. TONJES,
A. J. HURLEY,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed Aug. 27, 1947.

[Title of Tax Court and Cause.]

SERVICE OF ANSWER AND NOTICE OF
PLACE OF HEARING

Service Is Hereby Made of Answer.

Notice of time of hearing at Los Angeles, California or vicinity will be sent when proceeding is calendared for hearing on merits.

/s/ VICTOR S. MERSCH,
Clerk.

To: Robert R. Weaver, Esq.,
403-404 First National Bank Bldg.,
Phoenix, Arizona.

Sept. 2, 1947.

[Title of Tax Court and Cause.]

NOTICE OF SETTING PROCEEDINGS FOR
HEARING—CIRCUIT CALENDAR

September 23, 1948.

Take Notice that a Division of The Tax Court of the United States will sit in Room 229, U. S. Post Office & Court House, beginning November 29, 1948, Los Angeles, Calif.

Hearings will be held in all proceedings shown on the attached list. The list will be called promptly at 10:00 a.m., as indicated, and you will be expected to answer the call at that time and be prepared for trial when reached. No continuance will be granted except for extraordinary cause. Failure to appear will be taken for cause for dismissal in accordance with the Rules of Practice, and you are in all other respects expected to be familiar with such rules.

Respectfully,

/s/ VICTOR S. MERSCH,
Clerk.

To: Robert R. Weaver, Esq.,
403-404 First National Bank Bldg.,
Phoenix, Arizona.

[Title of Tax Court and Cause.]

MINUTES OF PROCEEDINGS

Date: November 30, 1948.

Place: Los Angeles, Calif.

Docket No. 14661.

Proceeding: First National Benefit Society, a Corp.

Assigned to: Judge Van Fossan.

On the merits: Yes.

On motion of.....

Ordered:

Filed at hearing: Stipulation of facts with Joint Exhibits 1-A and 2-B, and petitioner's exhibits 3 thru 9.

Petitioner's brief: Jan. 14, 1949.

Respondent's brief: Jan. 14, 1949.

Replies: Jan. 31, 1949.

Witnesses for Petitioner: M. C. Reese, D. A. Harper.

Exhibits:

Petitioner's: 10. Statement.

Respondent's: C. Corp. income & excess profits tax ret. 1939. D. Individual income tax return—Melvin C. Reese—1939.

/s/ MARY Y. ROBERTS,
Acting Deputy Clerk.

The Tax Court of the United States

Docket No. 14661

**FIRST NATIONAL BENEFIT SOCIETY, a
Corporation,**

Petitioner,

vs.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.**

**Before: Ernest H. Van Fossan,
Judge.**

Appearances:

**ROBERT R. WEAVER,
403-4 First National Bank Building,
Phoenix, Arizona,
Appearing for the Petitioner.**

L. C. AARONS,

(HONORABLE CHARLES OLIPHANT,

**Chief Counsel,
Bureau of Internal Revenue),
Appearing for the Respondent.**

PROCEEDINGS

The Court: Call the next case.

**The Clerk: Docket No. 14661, First National
Benefit Society.**

Mr. Aarons: L. C. Aarons for the Respondent.

Mr. Weaver: Robert R. Weaver for the Petitioner.

The Court: You may state the issues.

Opening Statement on Behalf of the Petitioner
By Mr. Weaver

Mr. Weaver: The issues here are in brief, first, that the Commissioner should have allowed a deduction in the form of accrued but not paid salary of one of the executive officers, having accrued certain claims upon which proof had not yet been made that the other should have also been accrued. Also, that if Commissioner is to classify this company under Section 207 of the Internal Revenue Act, he should have allowed a deduction under 207(C) 1(a). Also, that in the event of classification under 207, that a deduction should have been allowed under 207(3)(c) and 4; that we contend the classification should not have been 207, but should have been classified under 201 of a life insurance company.

If the Court please, we have entered into a stipulation setting out, I believe, nine exhibits which to a large extent show the transactions of this company very completely. I now offer in evidence this stipulation with the attachments.

The Court: We will wait for the opening statements before we receive the exhibits.

Will you state your issues, Mr. Aarons?

Opening Statement on Behalf of the Respondent
By Mr. Aarons

Mr. Aarons: If the Court please, I think it may be helpful to expand just a bit upon Petitioner's statement of the issues.

Section 201 of the Revenue Act, 1938, classifies certain companies as life insurance companies, for purposes of income taxation.

Section 207 relates to mutual companies, other than life insurance companies.

The Commissioner has classified Petitioner as a 207 rather than a 201 corporation. Section 201, as it has stood substantially since 1921, is based upon the theory that the true income of life insurance companies is their investment income, that is, income from rents and dividends and interest, and that is the bases upon which life insurance companies, true life insurance companies are taxed, and in order to qualify as true life insurance companies, the statute and regulations require that true life insurance reserves be maintained, reserves as defined in Section 203 of the Regulations.

Now, this company, as is stipulated, has no investment income. So, the burden is upon the Petitioner to show how its reserves may be classified as true life insurance company reserves, under 201, and how it may be classified under that section, even though it has no investment income, which is the sole basis for tax under 201.

That issue, besides the other three issues, are that,

assuming the Petitioner is classifiable as a 207 company rather than a 201, is it entitled to certain deductions? One of the issues of those three is whether or not the amount deposited by Petitioner with the State Treasurer or Arizona is an addition to reserve of the type which is deductible under Section 207.

The Respondent claims that it is not of the type which is referred to specifically in Section 207.

Another one of the three subsidiary issues is whether the Petitioner is entitled to approve the salary which was due and owing to its president, Mr. Reese, even though and notwithstanding the fact that the Petitioner filed its returns on a cash basis. Petitioner contends in that regard that because the Commissioner treated one item, namely, claims paid on an accruable basis, that, therefore, the Petitioner can take advantage of that and have the salary of Mr. Reese deducted on an accruable basis, also.

The last of the specific items, on the assumption that the company is a 207 company, is an unspecified one in the petition, and I do not know exactly what Mr. Weaver plans to introduce. I will say only that the Respondent contends that the Petitioner has been allowed every deduction authorized by the statute.

Now, as further background for this case, I would like to point out that there have been **two** previous cases, starting in the District Court, going through the Circuit Court of Appeals for the Ninth

Circuit, with certiorari denied in the Supreme Court, involving this company and the United States. The first case involved the tax years of 1936 and 1937, and the second one involved the year of 1938. The Respondent will contend that those cases, both resulting in determinations in favor of the government, are controlling in this case.

The Court: You may proceed, Mr. Weaver.

Mr. Weaver: If the Court please, since counsel has gone into some of the law, might I make a few statements in the way of a statement?

The Court: You may.

Mr. Weaver: 201, Section 201 of the Internal Revenue Act, as it existed in 1939, provided that a company issuing life insurance or combined life, health and accident insurance, more than 50 per cent of whose reserves were held for the fulfillment of such contracts, was a life insurance company. The regulations, the Treasury Department Regulations, where the provisions are found that it must be a life insurance reserve within the meaning that it is calculated on a definite basis with an interest increment and a technical reserve. There has been a disagreement as to the validity of those.

However, it was decided, as counsel said, in this Circuit, in our case first, that we were not a life insurance company under our law as it existed.

You see, the regulations required that these reserves be required by law. That is not in the code

section, the Internal Revenue Code Section, so we were operating under a law in Arizona, which was changed when we came up with the second case.

But in the second case there was no decision, except that we had not borne the burden of proof that we were a life insurance company. So, I don't see how it could be *res judicata*, but now we are proceeding on a later year. We wish to raise different points that we never raised before, in regard to the matter of whether or not the company is a life insurance company, and the last decision merely said we had not borne the burden of proof, that it was a life insurance company.

As I say, there is a disagreement. I think five other Circuits have held this type of company were life insurance companies, and so we contend that we are a life insurance company. I believe that our specifications here set out the sections under 207, under which we would be entitled to a deduction if we were classified as a 207.

The Court: You have stipulated as to the facts in the case, have you?

Mr. Weaver: We have stipulated as to all the records. We have introduced the records which show the method of operations, how the reserves were kept, how they were transferred, and all those matters in regard to reserves. They are fully stipulated by stipulation, the introduction of these matters in evidence, and I think this case is 95 per cent in the stipulation we have here.

The Court: What is your testimony?

Mr. Weaver: The only testimony, there are certain items that I wish to introduce testimony in regard to.

The Court: You may introduce the stipulation. The stipulation is duly signed by both parties?

Mr. Weaver: Yes, sir.

The Court: The stipulation will be received. You may proceed with the testimony.

Mr. Weaver: Mr. Reese, will you take the stand?

Whereupon,

M. C. REESE

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: M. C. Reese.

Direct Examination

By Mr. Weaver:

Q. Mr. Reese, are you an officer of the First National Benefit Society? A. Yes, sir.

Q. What is your office?

A. I am entitled president.

Q. When was the company organized?

A. March, 1934.

Q. And you were its president at that time?

A. Yes, sir.

Q. And have been ever since? A. Yes, sir.

Q. Now, after having built up certain reserves,

(Testimony of M. C. Reese.)

have you now changed your operations? What I mean is, have you changed over from a mutual benefit society now?

A. The First National Benefit Society was reinsured by the First National Life Insurance Company, a legal reserve company.

Q. And that was in what year?

A. In March, 1947.

Q. This life insurance company has assumed the assets and the liabilities of the Benefit Society?

A. The life insurance company assumed the assets and liabilities of the Benefit Society by means of equitable distribution of the assets of the First National Benefit Society to the policyholders.

Q. Well, it assumed it by a contract, did it not?

A. And the distribution of assets.

Q. Now, it assumed also its tax liability, the same as everything else?

A. It also assumed the tax liability.

Q. In the organization, was the stock of the new company distributed to the members in proportion to the amount of their premium?

A. The entire stock was divided to all the policy holders on an equitable basis.

Q. What was that basis?

A. That basis was one share for each dollar per month premium which they paid to the company in premiums.

Q. So that the new company is owned by the

(Testimony of M. C. Reese.)

former policy holders that owned the Benefit Society? A. They are identical in ownership.

Q. The deposit with the State was taken out of the general expense fund of the Benefit Society; is that right?

A. The new deposit with the State was taken from the expense fund of the Benefit Society.

Q. What was the amount of that?

A. The amount was \$100,000.00.

Q. Now, this company was organized under the provisions of the law, as it existed in 1934. Was that Section 607, and following, in the 1928 Code?

A. It was organized under the law as it existed in 1928, organized in 1934, and operated after 1937 under the amended law of 1937.

Q. It was as stipulated, operating under the law as amended in 1937? A. That is correct.

Q. During the year in question, 1939?

A. That is correct.

Q. Now, during the life of this Benefit Society, of its business, was there ever any other item except the payment of death claims charged to the mortuary account?

A. No, sir, with one exception, on a '37 case, when they threatened to attach the mortuary money. I paid the tax out of the mortuary money, because that is where the money was.

Q. When the government was going to levy on it, you paid it out of there?

A. And that was subsequently replaced.

(Testimony of M. C. Reese.)

Q. Subsequently replaced in the mortuary fund?

A. Yes.

Q. In the exhibits in evidence here, there shows a \$6,500.00 asset in the form of a deposit on a bond. Would you explain what that is?

A. That was a deposit to secure a lower court judgment on a claim on an appeal case, which was returned to us later on.

Q. The \$6,500.00? A. \$6,500.00.

Q. The \$6,500.00 was returned and placed back in the funds of the Society?

A. Of the company, yes.

Q. I notice in some of the earlier—according to the exhibits on file—some of the early policies, there was a provision that expenses, attorneys' fees and expenses, of defending the fund could be charged to the mortuary fund. Was that ever done?

A. No, sir, that was never done. The wording of the policy was that the reserve, the specified portion of the premiums were set aside for the reserve, for the purpose of payment of claims and incidentals thereto. However, that was taken out by amendment to the by-laws in 1937.

Q. And during 1938 and 1939, the provisions of your by-laws forbid even charging the expense of the defendant—

Mr. Aarons: If I may interrupt, I feel I must object, because the by-laws are in evidence and they speak for themselves.

Mr. Weaver: I will withdraw the question.

(Testimony of M. C. Reese.)

Q. (By Mr. Weaver): Now, there is an exhibit in the stipulation, Mr. Reese, showing the 12 monthly sheets, monthly recapitulation sheets of your receipts ledger. These receipts, these pages showing a portion of the detailed receipts and the monthly recapitulation and transfer to reserves?

A. Yes.

Q. I am referring to Petitioner's Exhibit 4 under the stipulation. It shows on these receipts certain detailed transactions prior to the recapitulation entries. Are these the daily entries of these funds, of these receipts into the different funds?

A. Daily receipts are separated; 50 per cent to the expense fund and 50 per cent to the reserve fund, as per each individual certificate or each individual payment.

Q. Each individual payment of a premium is entered separately and allocated to the different funds on that receipts ledger. Is that right?

A. Yes.

Q. And those are the detailed information, a part of which shows on the recapitulation sheet each month, which is in evidence?

A. Yes.

Q. And the ledger contains about how many pages, the ledger itself?

A. The daily entry pages for the year 1939 was 2,800 pages, 144,000 entries.

Q. But the type of entry is shown just above the recapitulation entries on each of these 12 sheets for each month?

A. Yes.

(Testimony of M. C. Reese.)

Q. Now, in the Exhibit No. 1, under the stipulation, which shows the articles of incorporation and by-laws, these by-laws, do they set up these dues and assessments, premiums, on a basis of dues and assessments?

Mr. Aarons: I must object again. The by-laws speak for themselves.

Mr. Weaver: Yes. I will withdraw that. It is shown by the by-laws.

Q. (By Mr. Weaver): What was your basis of calculating this premium from the standpoint of reserves and premiums?

A. The estimated basis of calculating the cost of life insurance on these particular forms was according to U. S. death mortality rates.

Q. Then, you had set up a certain amount as advance assessment and a certain amount as dues added to it?

A. We set up a certain amount as advance assessment and a certain amount to cover operating expenses, still with the right of assessment.

Mr. Aarons: I object, if the court please. The statement that the Petitioner had the right of assessment is a conclusion of law, which may be an important issue in this case, and I object to it as being incompetent, on the ground it is a conclusion of law.

Mr. Weaver: Well, it is specifically given the right of assessment in the by-laws. The by-laws specifically provide for the matter of assessment.

(Testimony of M. C. Reese.)

The Court: Will the reporter read the question, please.

(The question was read.)

The Court: I will have to ask the reporter to read the question again. I do not understand it.

(The question was reread.)

Mr. Aarons: May I expand, if the court please, on my objection. The statute, Section 207(C), under which Section 207 the Respondent is classifying the Petitioner, provides for certain deductions for mutual companies, and one of the deductions is the net addition required by law to be made within the taxable year to reserve funds, included in the case of assessment insurance companies the actual deposit of sums with state or territorial officers, pursuant to law, adds to guarantee or reserve funds.

Now, it may be that it is important to determine in this case whether this company is an assessment company, and on that point, I object to the witness classifying the company in any way as an assessment company, because I believe the determination of that may be drawn entirely from the by-laws and from the policy contracts themselves, which are in evidence.

The Court: Any characterization by the witness will not be binding on the court. He may answer.

Mr. Weaver: It was answered, if the Court please. I believe that is all. Your witness.

The Court: You may inquire.

(Testimony of M. C. Reese.)

Cross-Examination

By Mr. Aarons:

Q. Mr. Reese, you stated that in March, 1947, the company changed over to a legal reserve company.

A. I stated that the First National Life Insurance Company assumed the liability and assets of the First National Benefit Society, and we signed the consent. Even this case should be the First National Life Insurance, assuming the liability.

Q. Well, your company—is the Petitioner now a legal reserve company?

A. The Petitioner is now a legal reserve company, the First National Life Insurance Company, but not the First National Benefit Society.

Q. Will you explain what the difference is to me, who is not too familiar with insurance technicalities, the difference between a legal reserve company and the type of company that yours was in the taxable year of 1939?

A. A legal reserve company, they compute their rates upon an adopted mortality table, writing various forms of investment insurance, giving extended insurance values, cash values, loan values, and so forth, with an interest increment added to that reserve each year, loading the premium from the net cost of the insurance to the selling cost, which is the expense operation of the company.

Now, an assessment company is a mutual company which cannot grant loan values and free insurance or extended insurance for a period of time,

(Testimony of M. C. Reese.)

and they are supposed to operate as a mutual company and be owned by the policy holders, and not as a proprietary institution. Therefore, in view of the fact they cannot grant loan values and give cash values, extended insurance values, their rates would normally be lower, but being covered under the laws, as they exist, any mutual company does have the right of assessment, whereas a legal reserve company does not have the right of assessment, a stock company.

Q. While we are on that subject of assessment, Mr. Reese, I would like to show you a specimen copy of a property floater policy of the Central Manufacturers' Mutual Insurance Company of Van Wert, Ohio.

Now, Article 10 of that policy is headed, "Non-assessable Policies." It reads: "No member shall be liable for losses or expense or any indebtedness of the company, except to the extent of the premiums paid. All policies of this company shall be without assessment and liability whatsoever."

A. Is this a reciprocal?

Q. I would like you to examine that policy and tell the Court whether you think it is an assessable policy.

Mr. Weaver: If the Court please, I object.

The Witness: I will answer it for you.

Mr. Weaver: I will withdraw the objection.

The Witness: If they have a deposit with the state of Illinois, and if that deposit becomes im-

(Testimony of M. C. Reese.)

paired, they place a lien against the policy, and *the* pay the losses on a provided basis and the company will fold up, the same as any mutual legal reserve life insurance company.

Mr. Aarons: I would like to offer this specimen policy of the Central Manufacturers' Mutual Insurance Company in evidence as Respondent's exhibit.

Mr. Weaver: I object to it as not tending to prove any of the issues in this case, and it has nothing to do with this company.

The Court: I don't believe it will add any evidence in this case.

Mr. Aarons: If the Court please, the witness has testified, or has attempted to show, that Petitioner's policies are assessable. They contain language almost identical to the language which I read from this specimen policy of another company, and that paragraph headed, "Non-assessable," I believe it has some probative force.

The Court: I sustain the objection.

Q. (By Mr. Aarons): Mr. Reese, I show you what purports to be the corporation income and excess profit tax return of the First National Benefit Society for the year 1939, and ask you whether this is your signature.

A. This top signature is my signature.

Mr. Aarons: Without objection, I wish to offer this return as Respondent's Exhibit C.

Mr. Weaver: No objection.

The Court: Are Exhibits A and B attached to the stipulation?

(Testimony of M. C. Reese.)

Mr. Aarons: Yes, your Honor, joint Exhibits 1-A and 2-B are attached to the stipulation.

The Court: This is Exhibit C.

(The document above-referred to was received in evidence and marked Respondent's Exhibit No. C.)

Q. (By Mr. Aarons): Mr. Reese, I show you what purports to be an individual income tax return, 1939, for Melvin C. Reese, and ask you whether this is your signature at the end of the return.

A. Yes, sir, that is my signature.

Mr. Aarons: If the Court please, I offer the individual tax return for 1939 of Melvin C. Reese as Respondent's Exhibit D.

Mr. Weaver: I have no objection.

The Court: Exhibit D in evidence.

(The document above-referred to was received in evidence and marked Respondent's Exhibit No. D.)

Q. (By Mr. Aarons): Mr. Reese, would you state how many bank accounts were maintained in 1939 by the Petitioner? A. One bank account.

Q. And in that account were all of the receipts placed that were received by the company?

A. Yes, sir.

Q. That is, there was no attempt to segregate as separate funds the reserve for expenses and the mortuary reserve?

(Testimony of M. C. Reese.)

A. The books separated the money, although the money was in one place.

Q. The actual segregation, therefore, is shown only on the books of the corporation?

A. Yes, sir.

Q. Your books, Mr. Reese, are maintained on a cash basis; is that correct?

A. Yes, sir, they are maintained on a cash basis.

Q. And your return, which is in evidence, shows that it is filed on a cash basis?

A. Yes, sir.

Q. You stated something, I believe, about the basis upon which the amount of the premiums charged in 1939 were calculated. Is it correct that 50 per cent of the premiums were supposed to go into the mortuary reserve, and that on the basis of the American experience mortality table, that is, speaking of 1939, were $3\frac{1}{2}$ per cent assumed rate of interest, that those premiums were supposed to be sufficient to cover your claims?

A. No. I stated that according to the U. S. table of mortality, which is an accurate table of mortality, that the amount apportioned to pay those losses was sufficient to pay those losses as they arose.

Q. Well, is there an assumed rate of interest in that table of mortality, of which you are speaking?

A. Not on an assessment insurance. There couldn't be, not even in the U. S. mortality table. It is a current death rate.

Q. Mr. Reese, in the previous case involving the year 1948, Amos A. Betts, a member of the Arizona

(Testimony of M. C. Reese.)

Corporation Commission, testified that the requirements of the Arizona Commission were that an amount had to be set aside in reserve, which would be equivalent to or approximately the same as the American table of mortality experience, which would be $3\frac{1}{2}$ per cent. Was that testimony incorrect?

A. Mr. Betts is deceased. He was not an insurance man. He was a utility man. However, in the determination of rates of insurance, a 1-year term rate has no interest increment or a group life insurance rate has no interest increment. Still it is on a mortality table, or an estimated mortality table, which would be the equivalent to a mortality table. The step-rate term plan has no interest increment.

Q. Has your annual income always been sufficient to meet the total amount of claims maturing each year? A. Up to date.

Q. Actually are not your premiums sufficiently large or perhaps loaded, as they say in insurance terminology, to make it possible so that each year, excepting for some unexpected catastrophies, the annual income equals the annual outgo, at least equals the annual outgo?

A. The 16 years' operation shows an excess savings in mortality funds of \$120,000, with \$1,300,000 disbursed out in death claims.

Q. What is the total amount of insurance which was outstanding, which had been issued by your company and which was outstanding at the end of the year, the year of 1939?

(Testimony of M. C. Reese.)

A. The total amount of insurance which was outstanding, exposure, on the greatest basis, the policy graded the first year, was four million and a half.

Q. Now, in the balance sheet, which is attached to your income tax return for the year 1939, that is the Petitioner's income tax return, the liabilities are shown as depreciation for furniture and fixtures, two hundred thirty-nine dollars and some-odd cents; expense funds, thirty-one hundred seventy-three dollars and some-odd cents; benefit funds, sixteen thousand four hundred eighty dollars and some-odd cents. You say you had over four and one-half million dollars of insurance outstanding at the end of that year; is that correct?

A. Yes, with no other than current losses against it.

Q. So that the current losses, so long as they did not overbalance the current income, the company was on a sound basis?

A. Any assessable company never can become insolvent. *The* haven't the right of assessment.

Mr. Aarons: May it be understood, if the court please, that I retain and continue my objection to the classification of the company as an assessment company.

Q. (By Mr. Aarons): Under the procedure under which the company now operates as a legal reserve company, Mr. Reese, each individual company was evaluated and a policy reserve placed against that individual policy?

(Testimony of M. C. Reese.)

A. Under all business written since March, 1947, legal reserve business requires not forfeiture values by law, and consequently they are figured upon an interest increment rate, in order to provide the loan values and the reserve values, which the person can withdraw at any time, the policy holder.

Q. The legal reserve is calculated by evaluating each particular policy, is it not?

A. With the exception of what we would call term insurance or group insurance. That is termed legal reserve insurance, but there is no value to it, other than just the straight death benefit.

Q. Then, is the main difference between legal reserve and the way you formerly operated, namely, that the reserve, policy reserve, for each policy must build itself up with interest increases?

A. Yes.

Mr. Aarons: If the court please, that is all I have to ask, excepting that I wish to ask the court's permission for substitution of photostatic copies of the returns placed in evidence.

The Court: That may be done.

Mr. Weaver: If the court please, I would like to ask a question or two in regard to matters taken up by counsel.

The Court: Proceed.

Redirect Examination

By Mr. Weaver:

Q. Mr. Reese, isn't it a fact that the difference between the reserve of a legal reserve company and

(Testimony of M. C. Reese.)

an ordinary benefit society is that the legal reserve is a reserve against each policy, while that of the benefit society is a common reserve against all of its liability? A. Yes.

Q. The legal reserve, that has nothing to do with bank accounts? A. No.

Q. It is a difference in bookkeeping system?

A. A difference in the bookkeeping system.

Q. The testimony of Mr. Betts—you were asked your recollection of that testimony. Isn't it your recollection that he had testified that the Corporation Commission submitted these policies to an actuary and received an assurance that it was equivalent to the American experience table of 3 per cent, before they approved it?

A. It is my recollection of the testimony that he stated that the rates were sufficient to meet the current mortality losses, in accordance with American experience mortality table, which would mean on a straight term to term basis.

Q. Now, in regard to the question that was asked you in regard to the meeting of these claims as they were presented, did you at any time during the early life of the company transfer funds from the expense account to the mortuary?

A. Yes, sir.

Q. That was done, a \$3000 item in the year of 1939? A. Yes, sir.

Q. In other words, expense money was transferred to the mortuary to meet the claims?

(Testimony of M. C. Reese.)

A. Yes.

Q. None of your assets were—in the way of bank accounts or any other assets—none were earmarked for any particular reserve, but were on the opposite side of the ledger from all liability?

A. They were marked plainly for those to go into the claim fund, and those to go into the expense fund.

Q. That is, the funds as they come in, your funds are so separated? A. Yes.

Mr. Weaver: I believe that is all.

The Court: Have you any other questions?

Mr. Aarons: Just one question, if the court please.

The Court: Proceed.

Recross-Examination

By Mr. Aarons:

Q. Mr. Reese, would you identify this volume as being the U. S. Circuit Court of Appeals for the Ninth Circuit, a transcript of record in the case of First National Benefit Society vs. W. P. Stewart, transcript No. 11039?

A. I know this looks like it. I would say this is it. I have read part of it.

Mr. Aarons: If the court please, since there have been several references in the testimony to the previous case, the 1938 case, I think it may be helpful to the court to have the transcript of the record in this case, and I so offer it.

(Testimony of M. C. Reese.)

Mr. Weaver: If the court please, I object to it for the reason that it makes such a tremendous record. This company has already had involved, and in some years coming up, will have over \$53,000 in taxes in question, and if we should want to take this case up at any time, it would make a tremendous record to have that involved in it, and I don't believe it is necessary.

The Court: What do you propose to prove by that? How do you operate?

Mr. Aarons: Well, there were several references in the testimony, your Honor, to the testimony of Amos Betts.

The Court: Are you proposing that the testimony appearing in that record be incorporated as a part of the transcript here?

Mr. Aarons: No, your Honor, but to verify whether or not the statements made as to the testimony in that case are statements now made, correct statements.

The Court: I will sustain the objection. Is there anything further?

Mr. Aarons: No, sir.

Mr. Weaver: Not with this witness, if the court please. I have one more witness for just a moment.

(Witness excused.)

I will call Mr. Harber.

Whereupon,

D. A. HARBER

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: D. A. Harber.

Direct Examination

By Mr. Weaver:

Q. What is your profession, Mr. Harber?

A. I am an accountant.

Q. You were at one time an accountant for the insurance department of Arizona?

A. An examiner.

Q. You are now an accountant—what is your present occupation?

A. An accountant and auditor for the First National Life Insurance Company.

Q. How long have you been in that business?

A. Since September, 1947.

Q. Are you familiar with the books of the corporation? A. Yes, I have reviewed them.

Q. And the books of the First National Benefit Society in the same office?

A. I have reviewed them in regard to this case.

Q. These books are quite voluminous?

A. Quite so, yes, sir.

Q. But you have examined these books and made certain transcripts from them? A. Yes, sir.

(Testimony of D. A. Harber.)

Q. I am showing you a statement, what purports to be a statement, showing the increase and decrease in the mortuary funds and expense fund of 1939. Was this prepared by you from the books?

A. Yes, sir, and adjusted by the—our books are on a cash basis, and this statement was made from the books and adjusted by the accrued losses at the beginning of the year, the end of the year, and also by adjusting the depreciation for furniture and equipment to the amount allowed by the Commissioner, and adding back a Federal income tax paid item that was included in the deduction from the expense fund.

Q. That was the original error——

A. No, our ledger would show that as an expense, while it would not be an expense allowance for income tax purposes.

Q. This was actually prepared by you from these books? A. Yes, sir.

Mr. Weaver: I am offering this statement in evidence.

The Witness: There is another adjustment. The books show there is a \$3000 transfer from the expense fund to the mortuary fund, and the books showed it divided between the mortuary fund and the morbidity fund. The State Examiner threw it all into the mortuary fund, and this statement agrees with the Examiner's report for that year.

The Court: Is there objection?

Mr. Aaron: I would like to ask the witness a

(Testimony of D. A. Harber.)

question before I state whether I object or not, if the court please.

The Court: Proceed.

Cross-Examination

By Mr. Aarons:

Q. Mr. Harber, have you testified as to any and all differences or discrepancies that there might be between the figures shown on this sheet and the figures as they are shown on your corporate books and records?

A. As far as my knowledge, it is reconciled from the banking examiner's report—the insurance examiner's report, which was made from the records of the company.

Q. And you believe that this sheet does show a true financial picture of the status of these two funds specified thereto?

A. It shows the proper income and disbursements to the two separate funds as kept by the company.

The Court: Any further questions?

Mr. Aarons: I don't have anything further, your Honor.

The Court: Exhibit 3.

The Clerk: 3 through 9 are attached to the stipulation.

The Court: Is this a joint exhibit?

Mr. Weaver: This is not a joint exhibit.

(Testimony of D. A. Harber.)

Mr. Aarons: This will be Exhibit No. 10, if the court please.

The Court: Exhibit No. 10.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 10.)

Mr. Weaver: That is all.

Mr. Aarons: I have nothing further.

Mr. Weaver: If the court please, that is our case. We rest.

Mr. Aarons: Respondent rests.

The Court: The clerk will fix the time for filing of briefs, in accordance with the rule.

The Clerk: January 14, 1949, for the opening briefs, and January 31, 1949, for the reply brief.

The Court: I believe that is all we have today. We will recess until 2:00 o'clock tomorrow.

(Whereupon, at 3:20 o'clock p.m., Tuesday, November 30, 1948, the hearing in the above-entitled matter was closed.)

[Endorsed]: Filed Dec. 21, 1948.

[Title of Tax Court and Cause.]

STIPULATION

It is hereby stipulated and agreed, by and between the parties hereto, through their respective counsel, that the following facts shall be taken as true, and that the following described exhibits may be received in evidence, without prejudice to the right of either party to introduce other and further evidence not inconsistent herewith:

1. Petitioner is a corporation organized and existing under and by virtue of the laws of the State of Arizona. Petitioner filed its Federal income tax return for the calendar year 1939 with the Collector of Internal Revenue for the District of Arizona. On its said return petitioner reported no tax liability. The tax in controversy is income tax for the calendar year 1939, in the amount of \$1,135.83, which represents the deficiency determined by respondent.

2. During the period involved, petitioner was engaged in business under the "Benefit Corporation Law of 1937" of the State of Arizona, being Chapter 36 of the Arizona Session Laws of 1937, and incorporated in the Arizona Code of 1939 as sections 53-601 to 53-622 inclusive.

3. Attached hereto as Joint Ex. 1-A are the Articles of Incorporation and By-Laws of petitioner as the same existed during the year 1939, including the amendments to the said By-Laws as they then existed.

4. Attached hereto as Joint Ex. 2-B are blank printed forms H, XXX, XXX-GG, XXX-J, XXX-FG, and AH-1, being forms of membership certificates and insurance policies typical of those issued by petitioner during the year 1939.

5. The type and number of policies issued by petitioner and in force as of May 31, 1939, were as follows:

Type	Number of Policies
Assessment Forms	34
Individual	7,253
Family group	2,369
Joint	685
Juvenile	219
Health and Accident.....	249
Penny a Day.....	181
Total	<u>10,990</u>

6. Petitioner's income during the calendar year 1939 was entirely from premium payments and none of its income was from interest, dividends or rents.

7. Attached hereto as Petitioner's Ex. 3 is a transcript of petitioner's general ledger accounts for the year 1939.

8. Attached hereto as Petitioner's Ex. 4 are photostatic copies of the final monthly sheets of petitioner's Receipts Journal for the year 1939 with recapitulation of amounts transferred to other accounts of the general ledger.

9. Attached hereto as Petitioner's Ex. 5 are photostatic copies of the final monthly sheets of petitioner's Disbursements Journal for the year 1939.

10. Attached hereto as Petitioner's Ex. 6 is a photostatic copy of the sheet of petitioner's Disbursements Journal for the year 1939 showing closing entries for such year.

11. Attached hereto as Petitioner's Ex. 7 are photostatic copies of petitioner's journal for the year 1939.

12. Attached hereto as Petitioner's Ex. 8 is a copy of petitioner's minutes adopting Salary Contract of June 30, 1937, with M. C. Reese, petitioner's president.

13. Attached hereto as Petitioner's Ex. 9 is a schedule of petitioner's Salary Contract Liability to M. C. Reese, petitioner's president.

/s/ ROBERT R. WEAVER,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent.
E.C.C.

[Endorsed]: Filed Nov. 30, 1948. T.C.U.S.

The Tax Court of the United States

Docket No. 14661

FIRST NATIONAL BENEFIT SOCIETY,
a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

1. Petitioner failed to establish that it was a life insurance company as contemplated by section 201, I.R.C., and entitled to be taxed as such, its so-called "reserve funds" not being held exclusively for the fulfillment of its life insurance and other like contracts and being subject to invasion for other purposes.

2. Petitioner as a mutual insurance company, other than life, is not entitled to a deduction for a deposit made with the State Treasurer of Arizona since the reserve funds were not such as those specified in section 201(c)(1)(A).

3. During the taxable year, petitioner was not an assessment company and as such not entitled to deductions claimed under section 207(c)(1)(A).

4. Petitioner, on a cash basis, is not entitled to a deduction for a portion of its general manager's compensation not paid in 1939 but claimed as an accrued expense liability.

Robert R. Weaver, Esq., for the petitioner.

L. C. Aarons, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT
AND OPINION

The respondent determined a deficiency of \$1,135.83 in the petitioner's income tax liability for the year 1939.

The primary issue is whether the petitioner, during the year 1939, was a life insurance company within the provisions of section 201 of the Internal Revenue Code, or was a mutual insurance company, other than life, within the meaning of section 207 thereof.

If the petitioner is held to be a mutual insurance company other than life, as defined by section 207, the subordinate issues are:

1. Was the petitioner entitled to a deduction of \$4,518.71, deposited with the Arizona State Treasurer during the taxable year, under the provisions of section 207(c)(1)(A)?

2. Was the petitioner, on the cash basis, entitled to deduct \$3,675.41 representing the unpaid portion of the salary of its president due during the taxable year?

3. Was the petitioner entitled to deduct further amounts under the provisions of section 207(c)(3)?

Findings of Fact

Certain facts were stipulated. The portions thereof material to the issues are as follows:

The petitioner is a corporation organized and existing under and by virtue of the laws of the State of Arizona. The petitioner filed its Federal income tax return for the calendar year 1939 with the collector of internal revenue for the district of Arizona. On its return the petitioner reported no tax liability.

During the period involved, the petitioner was engaged in business under the "Benefit Corporation Law of 1937" of the State of Arizona, being Chapter 36 of the Arizona Session Laws of 1937, and incorporated in the Arizona Code of 1939 as sections 53-601 to 53-622, inclusive. Its purpose was——

That the objects and purposes for which said Corporation is formed are: To engage in, conduct and carry on the business and customary activities of a mutual benefit association within the meaning and provisions of Sections 607-608-609-610 of Chapter 14 of Article 3 of the 1928 Revised Statutes of the State of Arizona as the same now exists; * * *

In the Articles of Incorporation, the petitioner is given authority to issue certificates of membership in assessment form and guaranteed cost certificates of various types. Its contractual liabilities "upon any one member" was specifically limited in both cases. Its funds were denominated (1) Benefit Fund, (2) General Fund, and (3) Reserve Fund and/or Trust Fund. The funds were described as follows:

Benefit Fund and/or Reserve Fund and/or Trust Fund: The Benefit Fund and/or Reserve Fund

and/or Trust Fund of the Corporation, consisting of those moneys received shall be used for the purpose of payment of claims originating under and in connection with claims pertaining to all certificate forms, and in addition thereto such funds shall be charged a nominal amount for each claim in connection therewith as expense money as so allocated by all contracts of membership. Such amount to be determined from time to time as the Board of Directors may deem advisable.

General Fund: The General Fund consisting of the membership fee, semiannual dues, and other portions of money so allocated to said fund from any source whatsoever, and shall be used for general administration purposes of the business in its entirety except payments of death claims, and the General Fund of the Corporation shall in no way be subject for use of payment of any death claims unless at the discretion of the Board of Directors.

Reserve Fund and/or Trust Fund: The Reserve Fund shall be distributed to the Benefit Fund and consist of those moneys allocated to such fund as so specified in the Guaranteed Cost certificates of membership, and such fund shall be used for payment of death claims as so specified membership certificates; and in addition thereto such funds shall be charged a nominal amount for each claim in connection therewith, as expense money as so allowed by all contract of membership. Such amount to be determined from time to time as the Board of Directors may deem advisable.

The scope of the petitioner's funds was set forth as follows:

Section I. The funds of the Society which consist of the following: The Benefit Fund and/or Reserve Fund and/or Trust Fund, and such other funds as the Board of Directors may hereafter from time to time determine and establish. A separate accounting for such funds shall be kept in the books of the Society.

Section II. Benefit Fund, and/or Reserve Fund, and/or Trust Fund: The Benefit Fund, and/or Reserve Fund, and/or Trust Fund, which consist of all moneys paid to or coming into the possession of the Society, during the notice period allowed in the certificate and notice for the payment of death assessments made from time to time by order of or direction of the Board of Directors for the purpose of paying death claims of members, taxes and other necessary expenses incurred in the administration and defense of said fund.

Section III. General Fund: The General Fund which shall consist of such amounts so specified as dues and other renewal moneys collected after the notice period allowed in the certificate and notice for the payment of the death assessments shall be used to defray expenses incidental to the operation of the Society, including salaries, rentals, printing, postage, etc.

Section IV. Reserve Fund and/or Trust Fund:

The Reserve Fund and/or Trust Fund, shall consist of those moneys allocated to such fund as so specified in certificate of membership so issued by the Corporation. Such moneys shall be used for payment of death claims in accordance with the terms of the membership certificates and for taxes and other necessary expenses incurred in the administration and defense of said fund.

By amendments to its By-Laws the petitioner was authorized to issue various certificates called Guaranteed Reserve, Juvenile, Family Burial, Family Group, Accident and Health, Joint policy, "Penny a day life," Death Benefit, etc., and various modifications of the certificates already authorized.

The petitioner issued Forms H, XXX, XXX-GG, XXX-J, XXX-FG, and A-H-1 typical of membership certificates and insurance policies issued by it during 1939. All of these policies were designated "Guaranteed Reserve Certificates." In all of them appears the provision, "The member shall not be liable for any debts of the Corporation or for any other obligations save and except the premium deposits required hereon and then only so long as the Certificate remains in force and effect." Form H covered death from any cause; Form XXX covered natural and accidental death and loss of limb; Form XXX-GG covered natural death of member and accidental death of member and beneficiary; Form XXX-J covered natural and accidental death of member and co-member; Form XXX-FG covered natural and accidental death of the member and

dependents, while Form A-H-1 covered accidental loss of life and limb, disability benefits, etc. Each policy provided that premium deposits after one year from the date of the policy should consist of the certificate fee and General Fund Dues and after the payment of the General Fund Dues the remainder of such deposits should "be placed in a Trust Fund for distribution to the Mortuary Fund as required"; except Form A-H-1 which required the remainder to be distributed to the "claim fund."

All policies contained the clause:

Reserve: The By-Laws of the Corporation require the deposit in an amount not less than fifty per cent (50) of each premium deposit for the purpose of payment of claims and expenses incidental thereto.

The type and number of policies issued by the petitioner and in force, as of May 31, 1939, were as follows:

Type	Number of Policies
Assessment Form	34
Individual	7,253
Family group	2,369
Joint	685
Juvenile	219
Health and Accident	249
Penny a Day	181
<hr/>	
Total	10,990

The petitioner's income during the calendar year 1939 was entirely from premium payments and none of its income was from interest, dividends or rents.

On June 30, 1937, the petitioner's board of directors, consisting of M. C. Reese, M. S. Reese and C. W. Reese, authorized the petitioner to employ M. C. Reese as its general manager for a term of 20 years and pay him for his services a sum equal to 10 per cent of the petitioner's gross income. During the year 1939 Reese earned \$18,075.11 pursuant to the employment contract but was paid only \$12,000, leaving a sum of \$6,075.11 on its books as due to him.

The record discloses the following additional facts:

The petitioner maintained only one bank account in which all its receipts were placed. No attempt was made by the petitioner to separate the various expense and reserve funds. The actual segregation was shown only on its books. Its books were maintained on a cash basis and its income tax return was filed on that basis.

Prior to and during the taxable year the petitioner relied on its annual premium receipts to pay its current expenditures, including claims. Prior to March, 1947, when the petitioner became a legal reserve company, no valuation was made of individual policies as a basis of determining the proper legal reserve. As the petitioner now operates, the policy reserves must build themselves up with interest increases.

In all its years of operation the petitioner never levied any assessments against its members or policy holders.

In showing the financial status of the petitioner's "Mortuary Fund" during 1939, losses or claims were accrued at the beginning and end of the year. The petitioner's books and records in other respects conform to the cash basis of accounting. Upon examining the petitioner's income tax return for the year 1939, showing no tax liability, the Commissioner held that its contention that it should be classified as a life insurance company under the provisions of section 201, I.R.C., was denied and that it was a mutual insurance company under section 207 thereof. He then determined an adjusted net income of \$6,883.83 as disclosed by the petitioner's books. The adjustments were made with the following explanations:

Items deducted in computing net income shown in your audit report not deductible for income tax purposes:

(a)	Compensation under M. C. Reese	
	Contract	\$3,675.41
(b)	Amount deposited with State Treasurer	4,518.71
(c)	Accrued losses (Claims) December 31, 1939	47.34
		<hr/>
		\$8,241.46

(d) Less: Accrued losses (Claims) December 31, 1938 overstated in your audit report 3,323.00

Difference as shown above \$4,918.46

(a) Compensation under M. C. Reese Contract—
\$3,675.41

The amount claimed as a deduction in your audit report as compensation due M. C. Reese under an alleged employment contract amounts to \$18,075.41. The amount actually paid Mr. Reese during the year under said alleged contract amounted to \$14,400.00; the difference, \$3,675.41, is disallowed for the reason that your books and records are on the cash basis of accounting.

(b). Amount deposited with State Treasurer—
\$4,518.71

The amount, \$4,518.71, deposited with the Arizona State Treasurer during the taxable year does not constitute additions required by law to be made within the taxable year to reserve funds within the meaning of section 207 of the Internal Revenue Code and therefore is not a proper deduction in computing your taxable net income under that section of the Act.

(c) Accrued losses (claims) at December 31, 1939—\$47.34

The amount of accrued losses (claims) at December 31, 1939 shown in your audit report at \$4,299.99

has been reduced to \$4,252.65. The balance, \$47.34, has not been substantiated as proven claims.

(d) Accrued losses (claims) at December 31, 1938—\$3,323.00

The amount of accrued losses (claims) at the beginning of the taxable year 1939, shown in your audit report at \$5,155.49, has been reduced to \$1,832.49, the amount reflected in the computation of your taxable net income for the preceding taxable year 1938 as accrued losses (claims) at the close of that year.

Opinion

Van Fossan, Judge:

The basic question at issue is whether or not the petitioner is a life insurance company as contemplated by the provisions of section 201, I.R.C., and, under the facts of record, free from tax liability, or was a mutual insurance company other than life and entitled to certain deductions as such, as provided in section 207.

The respondent's contention is that the petitioner is not a true life insurance company because it did not have "reserve funds" and that the "reserves," if any, were not "held for the fulfillment of its insurance contracts." He invokes section 19.203 (a)(2)-1 of Regulations 103¹ which contains the

¹Sec. 19.203(a)(2)-1. Reserve Funds — In general, the reserve contemplated is a sum of money, variously computed or estimated, which, with accretions from interest, is set aside (reserved) as a fund

definition of the word "reserve," adapted, as the respondent says, from the definition of that word as found in *Maryland Casualty Co., v. United States*, 251 U.S. 342.²

It was stipulated that the petitioner's income was derived wholly from premium payments and that none of it came from interest, dividends, or rents. Section 202(a)(1) defines the gross income of life insurance companies as follows:

Sec. 202. Gross Income of Life Insurance Companies.

(a) Gross Income Defined—

(1) In General—In the case of a life insurance company the term "gross income" means the gross amount of income received during the taxable year from interest, dividends, and rents.

The petitioner argues, therefore, that since it had no income from interest, dividends and rents it had no tax liability. It assumes and contends that it

with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims.

²The term "reserve" or "reserves" has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside—"reserved"—as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.

was a true life insurance company and qualified as such under the statutory definition of that type of organization as set forth in section 201(a), as follows:

Sec. 201. Tax On Life Insurance Companies.

(a) Definition—When used in this chapter the term “life insurance company” means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds.

A brief history of life insurance company taxation as it relates to section 201 is found in *Helvering v. Oregon Mutual Life Ins. Co.*, 311 U.S. 267, as follows:

Legislative history discloses that a deduction similar to that allowed by section 203(a)(2) first appeared in the Revenue Act of 1921, and has reappeared in every revenue measure since, including that of 1939. Prior to 1921, insurance companies had not been allowed such a deduction, but had been subject to the same tax plan as corporations generally; the 1921 Act, however, wholly exempted insurance companies from the general scheme of corporate taxation and set up special systems applicable to them alone. The new plan, as it related to life insurance companies, had as a major objec-

tive the elimination of premium receipts from the field of taxable income. It had long been pointed out to Congress that these receipts, except as to a very minor proportion of each premium, were not true income but were analogous to permanent capital investment. In all the Revenue Acts from 1921 through 1939, the gross income of life insurance companies no longer included premium receipts, but was limited to income "from interest, dividends, and rents." And, pursuant to the conceived analogy of reserves to capital investment, net income was to be determined by permitting, among other deductions from gross income, that same deduction here in dispute—a percentage of the "reserve funds required by law."

As entirely new and separate tax provisions relating only to life insurance companies were thus enacted, it became necessary specifically to define what constituted a "life insurance company" within the meaning of the Act. Therefore, it was declared in the 1921 Act and all its successors that "when used in this title [chapter] the term 'life insurance company' means an insurance company engaged in the business of issuing life insurance, and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds."

In the case at bar the controversy on this point

is narrowed down to the factual issue whether or not more than 50 per cent of the petitioner's reserve funds were held for the fulfillment of its life, health, disability and other contracts which came within the purview of the statute. Upon careful study of the record we find no adequate support of the petitioner's theory. In fact, the weight of the evidence is strongly against him.

The petitioner maintained only one bank account into which the receipts from all sources were deposited and from which all disbursements were made. No segregation or allocation was made of the receipts, except a nominal one, on the petitioner's books. The petitioner made no attempt to separate its various expense and reserve funds. It relied on its current premium receipts to pay its current expenditures including claims. No evaluation was made of individual policies from which a correct legal reserve might have been established. The petitioner never levied any assessments against its members or policy holders. In fact, with an insignificant exception, (34 out of 10,900) "assessment forms" were not issued. In all but one of the certificates submitted to us a clause was inserted that the petitioner's by-laws required a deposit not less than 50 per cent (no more) of the premiums for the payment of "claims and expenses incidental thereto." Even the exhibits submitted by the petitioner purporting to show the flow of funds into the mortuary reserve do not help its position.

The petitioner's Articles of Incorporation did not

require that any reserve should be held exclusively for the purpose of paying claims arising out of the "certificate" contracts but the so-called reserve funds might be invaded for any purpose. In *Commissioner v. National Reserve Ins. Co.*, 160 Fed. (2d) 956, the taxpayer, an Arizona corporation, was organized pursuant to the provisions of the Arizona "Benefit Corporation Law," the same legislation under which the petitioner was organized. In that case the Court held that although the reserve for the fulfillment of policy claims amounted to more than 50 per cent of the total reserve fund, the corporation was not a life insurance company because the reserve was also held for additional purposes. The Court further held that "Since the Company maintained only one 'reserve' fund, its mortuary fund, and since this fund was subject to invasion for premium refunds, it does not meet the statutory test which specifies a reserve fund held only to fulfill contracts." Thus the decision of the Circuit Court of Appeals sustains the respondent's contention that the reserve must be set aside exclusively for the fulfillment of contracts classified as life insurance commitments.

As a side light to the conclusion of the Court in the *National Reserve* case we note that in the report of the Committee on Ways and Means accompanying H.R. 7378, relating to the Revenue Bill of 1942, 77th Congress, 1st Session, the statement is made:

Section 201(c)(2) is new and defines the term "life insurance reserves." The definition is substan-

tially that contained for many years in the regulations with the addition that the reserves must be based on recognized mortality or morbidity tables, the health and accident reserves must be noncancelable, and unpaid loss reserves on such health and accident contracts are included if computed on a discount basis.

We also note that the petitioner was organized and engaged in business by authority of the Benefit Corporation Law of 1937 of Arizona (Chapter 36 Arizona Session Laws of 1937—Sections 53-601 to 53-622, inclusive, Arizona Code of 1939) and not under Chapter 61, Arizona Code of 1939, which covers the creation, operation and regulation of life insurance companies. This fact is significant in evaluating the petitioner's attempt to secure the benefit of Federal tax exemption. Further in its Articles of Incorporation it states precisely that it was formed to "engage in, conduct and carry on the business and customary activities of a mutual benefit association within the meaning and provisions of Section 607 (et seq.)."

Section 53-605 (one of the provisions in the Arizona Code corresponding to Section 607 et seq.) provides that a benefit corporation shall deposit with the state treasurer of Arizona \$1,000 before receiving its certificate, \$1,000 in monthly payments and shall make further deposits of \$1 for each \$1,000 of protection until a total of \$10,000 shall have been so deposited. The deposits so made are subject to a lien for any unsettled final judgment of a court of

Arizona (Section 53-605(d)) and any interest earned on the deposit or other corporate assets may be used for general operating expenses (Section 53-605(c) and 53-609(b)). It is obvious that the petitioner's so-called "reserve" held by the state treasurer of Arizona is not that contemplated by the statute since it may be invaded and completely wiped out at any time for purposes other than fulfilling its contractual obligations referred to in section 201(a), *I.R.C. First National Benefit Society, v. Stuart*, 134 Fed. (2d) 438.

In *Helvering v. Inter-Mountain Life Ins. Company*, 294 U.S. 686, the Court said:

The word "reserve" has many meanings. Accounts creating reserves are set up in almost every line of business and funds evidenced by the book entries are held for many and widely different purposes. As the act does not permit corporations other than insurance companies to make deductions of the kind here under consideration, "reserve funds" may not reasonably be deemed to include values that do not directly pertain to insurance. In life insurance the reserve means the amount, accumulated by the company out of premium payments, which is attributable to and represents the value of the life insurance elements of the policy contracts.

In that the petitioner's reserve bore no relationship to life insurance values it has also failed to con-

form its reserve to the concept of an insurance reserve as contemplated by the statute.

Therefore, we sustain the respondent's determination that the petitioner, during the taxable year 1939, was not a life insurance company as defined in section 201.

The respondent has taxed the petitioner as a mutual insurance company, other than life, pursuant to the provisions of section 207. Under section 207(c)³ such a company is entitled to certain deductions. The petitioner claims that the sum of \$4,518.71 deposited with the State Treasurer of Arizona during the taxable year was deductible as a net addition required by law to be made to its reserve funds. The respondent contends that such deposits were not those "required by law." What

³Sec. 207. Mutual Insurance Companies Other Than Life.

* * *

(c) Deductions—In addition to the deductions allowed to corporations by section 23 of the following deductions to insurance companies shall also be allowed, unless otherwise allowed—

(1) Mutual Insurance Companies Other Than Life Insurance—In the case of mutual insurance companies other than life insurance companies—

(A) the net addition required by law to be made within the taxable year to reserve funds (including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds); and

(B) the sums other than dividends paid within the taxable year on policy and annuity contracts.

we have said concerning the nature of the petitioner's so-called "reserve" funds in our discussion of the primary issue is equally applicable to this collateral issue.

Section 19.207-4 of Regulations 103 defines "reserve funds required by law" as follows:

* * * Reserve funds "required by law include not only reserves required by express statutory provisions but also reserves required by the rules and regulations of State insurance departments when promulgated in the exercise of an appropriate power conferred by statute, but do not include assets required to be held for the ordinary running expenses of the business, such as taxes, salaries, re-insurance, and unpaid brokerage. Only reserves commonly recognized as reserve funds in insurance accounting are to be taken into consideration in computing the net addition to reserve funds required by law.

In *Commissioner v. National Reserve Insurance Co.*, supra, the Court held that funds so deposited with the Arizona treasurer do not comply with the requirements of Section 19.203(a)(2)-1. In other words, it is not a real reserve fund. Since the "net addition" required by the Arizona statute was not made to a "reserve" fund, the deduction is not allowable.

The petitioner argues further that it was an assessment company during the taxable year and thus comes within the parenthetical inclusion of section

207(c)(1)(A). Assuming that the petitioner maintained such a reserve fund—and we have held otherwise—it has not proven that it was an assessment company.

During 1939 it had in force only 34 out of 10,900 outstanding “policies” (or a .32+ per cent), labeled “Assessment Forms,” the remaining being clearly not subject to assessment, as shown by the facts that the payments are called premiums, the contracts are called certificates or policies and their holders are denominated members or policy holders. Such “assessment forms” were not presented in evidence. We cannot determine their true character from their name alone. Consequently, the petitioner has failed to show that it was an assessment company and functioned as such during the taxable year. We, therefore, reject this contention.

In the second subordinate issue the petitioner claims the right to deduct \$3,675.41 representing the accrued portion of the compensation of its general manager (who is also its president) unpaid in 1939. It argues that since the respondent accrued the petitioner’s unpaid claims, which were reported at the close of the year and upon which no proof of claim had been made, he should have accrued also the unpaid portion of its president’s compensation or “salary.”

The petitioner made its return on the cash basis. The respondent accepted that basis and so computed all other items thereon with the single exception of the unpaid claims. He deemed that such treatment

was necessary correctly to reflect the petitioner's true income and the petitioner has not challenged the propriety of his action. Reese's salary or compensation is in the same category as other expense items and should be treated similarly—on the cash basis.

The petitioner has failed to present any evidence proving his claim to certain other deductions under section 207(c)(3) and, therefore, is considered to have abandoned the issue relating to them.

Decision will be entered for the respondent.

Received Sept. 1, 1949.

Entered Sept. 13, 1949.

The Tax Court of the United States, Washington
Docket No. 14661

FIRST NATIONAL BENEFIT SOCIETY,
a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered September 13, 1949, it is

Ordered and Decided: That there is a deficiency in income tax of \$1,135.83 for the year 1939.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Entered September 13, 1949.

Served September 14, 1949.

[Title of REDACTED Court and Cause.]

FILE MEMORANDUM IN RE: BOND

Amount of bond \$2271.66, Surety First Nat'l Benefit Society.

Date Approved & Filed Nov. 29, 1949. Approved by Judge Van Fossan.

ROBERT R. WEAVER,
Counsel for Petitioner,
403 First National Bank
Bldg., Phoenix, Arizona.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

The First National Benefit Society, hereinafter referred to as Petitioner, hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on September 13, 1949, ordering and deciding that there is a deficiency in income

tax due from Petitioner on review, for the calendar year 1939.

This Petition for review is filed pursuant to the provisions of Section 1141 and 1142 of the Internal Revenue Code.

The First National Benefit Society, Petitioner on review herein was incorporated on March, 1934, under Sections 607-610 of the 1928 Revenue Statutes of Arizona. During the period involved, the Petitioner was engaged in business under the "Benefit Corporation Law of 1937" of the State of Arizona, being Chapter 36 of the Arizona Session Laws of 1937, and incorporated in the Arizona Code of 1939 as sections 53-601 to 53-622, inclusive.

Said company filed its tax return for the year 1939 showing no income tax due with the Collector of Internal Revenue for the District of Arizona at Phoenix, Arizona, whose office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Nature of Controversy

The nature of the controversy is as follows:

The primary issue is whether the petitioner, during the year 1939, was a life insurance company within the provisions of section 201 of the Internal Revenue Code, or was a mutual insurance company, other than life, within the meaning of section 207 thereof.

If the petitioner is held to be a mutual insurance company other than life, as defined by section 207, the subordinate issues are:

1. Was the petitioner entitled to a deduction of \$4,518.71, deposited with the Arizona State Treasurer during the taxable year, under the provisions of section 207(c)(1)(A)?

2. Was the petitioner entitled to deduct \$3,675.41 representing the unpaid portion of the salary of its president due during the taxable year?

3. Was the petitioner entitled to deduct further amounts under the provisions of section 207(c)(3)?

Petitioner had been during the year 1939 and prior thereto writing insurance under the Mutual Benefit Law of the State of Arizona above referred to and its policies with the exception of a negligible amount where life insurance policies and its losses contingent upon death. Its reserve funds were held under the provisions of the Mutual Benefit Law of 1937, which were incorporated in the 1939 Arizona Code as Sections 53-601 to 53-622, inclusive.

Under this law the Petitioner must set aside a definite portion of its premium income in a Mortuary Fund. Petitioner is also required under said law to maintain a deposit with the State Treasurer of \$10,000.00. If Petitioner is a life insurance company under the provisions of section 201 of the Internal Revenue Code as it existed in 1939, under section 202 it would be taxed on its investment income, if it is not a life insurance company, but is a mutual insurance company other than life, under section 207 as the Respondent has classified Petitioner it would be entitled to the deductions under the subsections set out above for moneys held for

the payment of losses and expenses and those held as required by law in the form of a deposit with the State Treasurer.

There is also involved the question as to whether or not Petitioner is an assessment company within the meaning of the Internal Revenue Code providing for the taxation of assessment life insurance companies.

All of these issues were decided against Petitioner in the decision of the United States Tax Court entered herein on September 13, 1949.

Dated this 10th day of November, 1949.

/s/ ROBERT R. WEAVER,
Attorney for Petitioner.

Affidavit of service by mail attached.

Received Nov. 14, 1949, T.C.U.S.

Filed Nov. 29, 1949, T.C.U.S.

[Title of REDACTED Court and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Honorable Charles Oliphant, Chief Counsel,
Bureau of Internal Revenue, Washington,
D. C., and L. C. Aarons, Bureau of Internal
Revenue, 1100 Oviatt Building, Los Angeles,
California

You are hereby notified that the Petitioner, First
National Benefit Society, did on the 29th day of

November, 1949, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a Petition for Review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 29th day of November, 1949.

/s/ ROBERT R. WEAVER,
Attorney for Petitioner.

Receipt of copy acknowledged.

Received Nov. 14, 1949, T.C.U.S.

Filed Nov. 29, 1949, T.C.U.S.

[Title of Tax Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of Arizona,
County of Maricopa—ss.

Robert R. Weaver, being first duly sworn deposes and says: That affiant is a citizen of the United States and a resident of the County of Maricopa, that affiant is over the age of eighteen years, an Attorney at Law, and attorney of record in the above-entitled and foregoing action before the Tax Court of the United States, that affiant's business address is 403-04 First National Bank Bldg., Phoenix, Arizona; that on the 25th day of Novem-

ber, 1949, affiant served the within Designation of portion of the record to be certified, titled in the Tax Court of the United States and Request for preparation for the certification of the record, on the Respondent in said action, by placing a true copy of said Designation and Request in an envelope with postage prepaid addressed to:

Honorable Charles Oliphant, Chief Counsel,
Bureau of Internal Revenue, Washington, D. C.

L. C. Aarons, Bureau of Internal Revenue, 1100
Oviatt Building, Los Angeles, California,
and then by sealing said stamped envelope and depositing the same in the United States mail at Phoenix, Arizona, where is located the office of the attorney for Petitioner herein; that there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ ROBERT R. WEAVER.

Subscribed and sworn to before me this 25th day
of November, 1949.

[Seal] /s/ ROBERT C. MOORE,
Notary Public in and for the County of Maricopa,
Arizona.

My Commission Expires Sept. 29, 1951.

Received Nov. 28, 1949, T.C.U.S.

Filed Nov. 29, 1949, T.C.U.S.

[Title of Tax Court and Cause.]

REQUEST FOR PREPARATION FOR THE
CERTIFICATION OF THE RECORD

The Petitioner hereby requests the Clerk of the above-entitled Court to prepare and certify the record for review in the above-entitled matter.

Dated this 23rd day of November, 1949.

/s/ ROBERT R. WEAVER,
Attorney for Petitioner.

Received Nov. 28, 1949, T.C.U.S.

Filed Nov. 29, 1949, T.C.U.S.

[Title of Tax Court and Cause.]

DESIGNATION OF PORTION OF THE REC-
ORD TO BE CERTIFIED, TITLED IN THE
TAX COURT OF THE UNITED STATES

Comes Now, the Petitioner, First National Benefit Society, and designate as the portion of the record to be certified for review, the complete record and all the proceedings and evidence in the action.

Dated this 23rd day of November, 1949.

/s/ ROBERT R. WEAVER,
Attorney for Petitioner.

Received Nov. 28, 1949, T.C.U.S.

Filed Nov. 29, 1949, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 28, inclusive, constitute and are all of the original papers and proceedings, including Exhibits 1-A, 2-B, 3 thru 9, inclusive, attached to, the stipulation of fact and Exhibits 10, C and D, admitted in evidence, on file in my office as the original and complete record in the proceeding before The Tax Court of the United States in the above-entitled proceeding and in which the petitioner in The Tax Court has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 7th day of December, 1949.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 12433. United States Court of Appeals for the Ninth Circuit. First National Benefit Society, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record, Petition to Review a Decision of The Tax Court of the United States.

Filed December 20, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12433

FIRST NATIONAL BENEFIT SOCIETY,
a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

Comes now the First National Benefit Society, a Corporation, Petitioner in the above-entitled cause and states that the points upon which it intends to rely on appeal in this case are as follows:

1. That the Findings of Fact on file herein are not supported by the evidence,
2. That the Judgment is not supported by the evidence,
3. That the Judgment is not supported by the Findings of Fact,
4. That the Judgment is contrary to law, and
5. That the Court erred in the admission of evidence.

The reason for the statement of points included in numbers 1, 2, 3 and 4 above are briefly as follows:

I.

The Petitioner is a life insurance company within the meaning of Section 201 (a) of the Internal Revenue Act as it existed in the year 1939.

II.

The gross income of a life insurance company is defined in Section 202 of the said Internal Revenue Act as the gross amount of income received during the taxable year from interest, dividends and rents, while the evidence herein shows that Petitioner was taxed upon the addition to its reserves allocated to a mortuary fund out of premium income paid for that purpose.

III.

The evidence shows that during the year 1939, the Petitioner was engaged in the business of writ-

ing and issuing contracts of life insurance and that more than fifty per centum of its reserves were held for the fulfillment of such contracts within the meaning of said Section 201, and that said reserves were required by the statutes of the State of Arizona, and that these reserves were calculated upon an actuarial basis with assumed rates of interest and that such calculations were based upon recognized tables of mortality as required by the Treasury Department Regulation construing Section 201 (a) of the said Act for the year 1939. (Articles 201 (a)-1 and 203 (a)-1 of Treasury Regulations 101.)

The Tax Court erred in its Conclusion of Law to the effect that Petitioner did not have or maintain a "reserve fund" for the purpose of fulfilling its insurance contracts within the meaning of Section 201 (a) of the Revenue Act of 1939 as interpreted by Articles 201 (a)-1 and 203 (a)-1 of the Treasury Regulations 101, and such finding is contrary to the evidence herein.

IV.

The Tax Court erred in finding that Petitioner as a mutual insurance company, other than life, is not entitled to a deduction for a deposit made with the State Treasurer of Arizona since the reserve funds were not such as those specified in section 201(c)(1)(A). If the Petitioner is to be classified under Section 207 of the said Act it would be entitled to a deduction of those funds held to pay losses and expenses.

V.

The Tax Court erred in finding that during the taxable year, petitioner was not an assessment company and as such not entitled to deductions claimed under section 207(c)(1)(A). That if the Petitioner's reserves do not meet the qualifications of ordinary life insurance companies, then since Petitioner did nothing but a life insurance business and since its policies are required by law to provide for assessment Petitioner would be an assessment life insurance company.

VI.

The Tax Court further erred in its finding that Petitioner was not entitled to a deduction of \$4,518.71 deposited under the requirement of the State law with the Arizona State Treasurer during the taxable year, since the State Law required that this reserve be held for the fulfillment of its contracts.

VII.

The Tax Court erred in finding that the objects and purposes for which said Corporation is formed are: To engage in, conduct and carry on the business and customary activities of a mutual benefit association within the meaning and provisions of Sections 607-608-609-610 of Chapter 14 of Article 3 of the 1928 Revised Statutes of the State of Arizona, for the reason that the 1937 Arizona Benefit Corporation Act superseded the provisions of these sections, and the companies theretofore organized were required to operate under the latter statute.

VIII.

The Tax Court erred in its finding that it was proper for the Respondent to accrue losses on deaths that had occurred but were unreported at the end of the year without accruing unpaid salary claims for the same year.

Dated this 31st day of December, 1949.

/s/ ROBERT R. WEAVER,
Attorney for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed Jan. 4, 1950, U.S.C.A.

[Title of REDACTED Court and Cause.]

PETITIONER'S DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED AS THE RECORD ON REVIEW

Comes now the Petitioner, First National Benefit Society and designates as the portions of the record to be printed as the record on review the following portions of the record certified by the Clerk of the United States Tax Court, to wit:

1. Docket Entries, Document No. 1 of the certified transcript of the record.
2. Amended Petition, Document No. 4 of the certified transcript of the record.

3. Entry of Appearance, Document No. 5 of the certified transcript of the record.

4. Answer to Amended Petition, Document No. 6 of the certified transcript of the record.

5. Service of Answer and Notice of Place of Hearing, Document No. 7 of the certified transcript of the record.

6. Notice of Setting Proceeding for Hearing—Circuit Cal., Document No. 8 of the certified transcript of the record.

7. Minutes of Proceedings before the Tax Court of the U. S., Document No. 9, of the certified transcript of the record.

8. Official Report of Proceedings, Document No. 10, of the certified transcript of the record.

9. Stipulation of Facts, Document No. 11, of the certified transcript of the record.

10. Joint Exhibits 1-A, 2-B, 3 thru 9, Incl. Attached to Stipulation of Facts, Document No. 12, of the certified transcript of the record.

11. Exhibits 10, C & D Admitted in Evidence, Document No. 13, of the certified transcript of the record.

12. Memorandum Findings of Fact and Opinion, Document No. 21, of the certified transcript of the record.

13. Decision, Document No. 22, of the certified transcript of the record.

14. Bond in the Amount of \$2,2771.66, Document No. 23, of the certified transcript of the record.

15. Petition for Review, Document No. 24, of the certified transcript of the record.

16. Proof of Service of Petition for Review, Document No. 25, of the certified transcript of the record.

17. Affidavit of Service of Designation of Record and Request for Preparation for the Certification of Record, Document No. 26, of the certified transcript of the record.

18. Request for Preparation for the Certification of Record, Document No. 27, of the certified transcript of the record.

19. Designation of Record, Document No. 28, of certified transcript of the record.

20. Certificate and Seal.

Dated this 31st day of December, 1949.

/s/ ROBERT R. WEAVER,
Attorney for Petitioner.

[Endorsed]: Filed Jan. 4, 1950.

[Title of Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the respective parties herein, through counsel, that there may be omitted from the printed record herein:

1. Joint Exhibit 1-A, being the Articles of Incorporation and the By-Laws of petitioner as both existed during the year 1939, including the amendments to the By-Laws as those existed in 1939.

2. Joint Exhibit 2-B, being blank printed forms H, XXX, XXX-GG, XX-J, XXX-FG, and AH-1, being forms of membership certificates and insurance policies typical of those issued by petitioner during the year 1939.

3. Petitioner's Exhibit 3, being a transcript of petitioner's general ledger accounts for the year 1939.

4. Petitioner's Exhibit 4, being photostatic copies of the final monthly sheets of petitioner's Receipts Journal for the year 1939 with recapitulation of amounts transferred to other accounts of the general ledger.

5. Petitioner's Exhibit 5, being photostatic copies of the final monthly sheets of petitioner's sheets of petitioner's Disbursements for the year 1939.

6. Petitioner's Exhibit 6, being a photostatic

copy of the sheet of petitioner's Disbursements Journal for the year 1939, showing closing entries for such year.

7. Petitioner's Exhibit 7, being photostatic copies of petitioner's journal for the year 1939.

8. Petitioner's Exhibit 8, being a copy of petitioner's minutes adopting the salary contract of June 30, 1937, with M. C. Reese, petitioner's president.

9. Petitioner's Exhibit 9, being a schedule of petitioner's salary contract liability to M. C. Reese, petitioner's president.

10. Petitioner's Exhibits 10, C, and D, all being in evidence.

It is agreed that any and all of these Exhibits shall be included in the printed record by reference, that the Court may so consider them, and that both parties may make whatever reference thereto on brief and an argument as may be deemed by them, or either of them, necessary, as if they had all been printed in full.

As condition to this stipulation, however, the parties agree that three copies of joint Exhibits 1-A and 2-B shall be by petitioner made available to the Court for use during consideration, argument, etc., in typewritten form.

This stipulation is based upon the fact that the amount of tax liability involved in the case does

not seem reasonably to justify any more printing than is actually necessary to the Court's convenience.

/s/ ROBERT R. WEAVER,
Attorney for Petitioner.

/s/ THERON L. CAUDLE,
Assistant Attorney General,
Attorney for Respondent.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,
United States Circuit Judges.

No. 12433

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BENEFIT SOCIETY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

FILED

MAR 30 1950

PAUL P. O'BRIEN,

ROBERT R. WEAVER,

403-404 First National Bank Building,
Phoenix, Arizona,

Attorney for Petitioner.

TOPICAL INDEX

	PAGE
Statement of the pleadings.....	1
Abstract of the case.....	4
Specifications of errors.....	6
Argument	7
Conclusion	19
Appendix:	
Excerpts from Arizona Revised Code of 1928.....	App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Abilene Ins. Co. v. Commissioner of Int. Rev., 137 F. 2d 191....	11
American Insurance Co. of Texas v. Thomas, 146 F. 2d 434....	11, 17
Bowers v. Lawyers Mortgage Co., 285 U. S. 182, 52 S. Ct. 350, 76 L. Ed. 690.....	9
Commissioner v. W. H. Luquire Burial Assn., 102 F. 2d 89.....	9
Commissioner of Int. Rev. v. Ore. Mutual Life Ins. Co., 311 U. S. 267.....	9
Employees of Swift & Co. v. Commissioner, 151 F. 2d 625.....	11
First National Benefit Society v. W. P. Stuart, 134 F. 2d 438....	14
General Life Insurance Co. v. Commissioner of Int. Rev., 137 F. 2d 185.....	11
General Life Insurance Company v. Commissioner of Int. Rev., 137 F. 2d 191.....	9, 15
Helvering v. Intermountain Life Insurance Co., 294 U. S. 686, 79 L. Ed. 1227.....	9
Helvering v. Oregon Mutual Life Ins. Co., 311 U. S. 267.....	7
Jones v. Oklahoma Benefit Assn., 151 F. 2d 505.....	11
Pioneer Mutual Benefit Association v. Corporation Commission, 123 P. 2d 828.....	13
Weiss v. Stearn, 265 U. S. 242, 44 S. Ct. 490, 68 L. Ed. 1001, 33 A. L. R. 520.....	9

MISCELLANEOUS

Appleman's Treatise on Insurance, Vol. 1, par. 12.....	16
Treasury Department Regulation 94, Articles 201(a)(1) and 203(a) (2)-1	10

STATUTES

PAGE

Arizona Benefit Corporation Act of 1937, Sec. 609 (now Sec. 53-609, 1939 Ariz. Code Anno.).....	13
Arizona Benefit Corporation Law of 1937, Sec. 607 (now Sec. 53-602, 1939 Ariz. Code Anno.).....	16
Arizona Revised Code of 1928, Secs. 607-610.....	5
Arizona Session Laws of 1937, Chap. 36, Sec. 1, p. 107 (Secs. 53-601 to 53-622, 1939 Ariz. Code Anno.).....	1, 3
Arizona Session Laws of 1937, Chap. 36 (now in Chap. 53 of the 1939 Ariz. Code Anno.).....	5
Internal Revenue Act, Sec. 201.....	3, 5, 8
Internal Revenue Act, Sec. 202.....	8
Internal Revenue Act, Sec. 203(a).....	7
Internal Revenue Act, Sec. 207.....	3, 4, 5, 6, 17
Internal Revenue Act, Sec. 207(c)(1)(a).....	3, 4, 6
Internal Revenue Act, Sec. 207(c)(3).....	3, 7, 17
Internal Revenue Act, Sec. 608b of the 1928 Ariz. Code, as amended in 1937 (Sec. 53-605, 1939 Ariz. Code Anno.).....	5, 6
Internal Revenue Act of 1939, Sec. 201(a).....	6, 8, 14
Internal Revenue Act of 1939, Sec. 202(b).....	15
Internal Revenue Code, Sec. 1141.....	1
Internal Revenue Code, Sec. 1142.....	1

No. 12433

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BENEFIT SOCIETY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Statement of the Pleadings.

This matter involves a question of Federal Income Taxes and alleged delinquency penalties for the calendar year 1939. The matter was tried in the United States Tax Court under the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The Petition for Review in the Tax Court sets out the jurisdictional matters as follows:

That the Petitioner is a Corporation duly organized and existing under and by virtue of the laws of the State of Arizona, and during the year 1939 was operating under the provisions of the Arizona Session Laws of 1937, Chapter 36, No. 1, page 107 (Secs. 53-601 to 53-622, 1939 Arizona Code Annotated).

That the return for the period involved was filed with the Collector for the District of Arizona, and that it involved Federal Income Taxes.

Sets forth the Post Office address of Petitioner as 807 West Washington Street, Phoenix, Arizona.

The Petition further states that the amount of the deficiency determined by the Commissioner for \$1,135.83 is income taxes for the year 1939, and that the Petitioner's return was filed with the Collector for the District of Arizona and covered its income taxes for the year ending December 31, 1939, and further that a notice of deficiency, a copy of which was attached to the Petition, was mailed to the Petitioner on March 14, 1947.

The Petition to the Tax Court sets out the following Assignments of Errors:

The determination of the tax set forth in said Notice of Deficiency is based on the following errors:

1. The Commissioner determined that compensation due M. C. Reese, accruing under an employment contract, during the year 1939, but not paid during that year was not deductible. Such determination was erroneous for the reason that although Petitioner filed its return on a cash basis, the Commissioner for the purpose of determining Petitioner's taxes for the said year actually accrued claims, where deaths had been reported but were paid during the following year, and this determination leaves the calculation partially on an accrual basis and partially on a cash basis.

2. The Commissioner determined that the sum of \$4,518.71 was not deductible from Petitioner's income during the said period. Such determination was erroneous, for the reason that whether Petitioner is to be classi-

fied as a Life Insurance Company under the provisions of Section 201 of the Internal Revenue Act, as it contends, or to be classified as an Insurance Company other than life, under the provisions of Section 207 of said Act, as it is classified by Commissioner it would be entitled to a deduction, even under Section 207 of the Internal Revenue Act as of that year from the net addition required by law to be made within the taxable year to reserve funds. (Sec. 207(c)(1)(A), Internal Revenue Act 1939.)

3. The determination of the deficiency was also in error, for the reason that although he had classified the Petitioner under 207 of the Internal Revenue Act as effective during the year 1939, he did not deduct those funds created by premium deposits, for the payment of expenses and losses as provided in said Section (Sec. 207(c)(3)).

4. The Commissioner erred in his classification of the Petitioner for the reason that the said Petitioner was during the year 1939 a Life Insurance Company, more than fifty per centum of its reserves being held for the fulfillments of its life insurance contracts.

The answer of Respondent admits that the Petitioner is a corporation, organized and existing under and by virtue of the laws of the State of Arizona, and that during the year 1939 was transacting business under and by virtue of the laws of the State of Arizona, Arizona Laws 1937, Chapter 36, No. 1, page 107 [Secs. 53-601 to 53-622, 1939 Ariz. Code Anno.), and admits that the return involved herein was filed with the Collector for the District of Arizona and involves Federal Income Taxes.

The Respondent's answer admits the amount of the deficiency the year for which the return was filed, and that the date upon which the notice of deficiency to Petitioner was mailed was March 14, 1947.

The Respondent's answer admits that the Commissioner determined that compensation of M. C. Reese under employment contract during the year 1939 and not paid during that year was not deductible, but denies that it was erroneous.

The Respondent admits that the Commissioner determined that the sum of \$4,518.71 was not deductible from Petitioner's income during the said period (the amount deposited with the Arizona State Treasurer for the year 1939), but denies that such determination was erroneous. [Tr. Rec. p. 18.]

The Commissioner's answer further denies that even though classified under Section 207 of the Internal Revenue Act the Petitioner would be entitled to a deduction of the net reserve required by law to be made within the taxable year to reserve funds under the provisions of Section 207(c)(1)(A), Internal Revenue Act of 1939. [Tr. Rec. p. 18.]

The answer also denied that the Commissioner had erred in classifying Petitioner as other than a Life Insurance Company during the year 1939.

The answer further admits that the tax return of Petitioner for the year 1939 was filed on a cash basis and admits that the Commissioner had classified Petitioner under Section 207 of the Internal Revenue Act of 1939, and denies all allegations not specifically admitted.

Abstract of the Case.

The primary issue is, as stated in the memorandum of the Tax Court, whether the petitioner, during the year 1939, was a life insurance company within the provisions of Section 201 of the Internal Revenue Code, or was a mutual insurance company other than life within the meaning of Section 207 thereof.

Further if the Petitioner is to be classified as a mutual insurance company other than life within the meaning of the said Section 207, was the Petitioner entitled to a deduction of \$4,518.71 deposited with the Arizona State Treasurer during the taxable year in accordance with the requirements of Section 608b of the 1928 Arizona Code, as amended in 1937 (Sec. 53-605, 1939 Ariz. Code Anno.).

There is also involved the question as to whether if Petitioner is to be classified under the provisions of Section 207 of the Internal Revenue Act of 1939, is it entitled to a deduction of funds received from premiums and held for the payment of expenses and losses, as provided in Section 207(c)(3) of the act.

There is the further question as to whether, since the Commissioner has accrued claims on deaths occurring in 1937 but reported and paid in 1939, the Petitioner would also be entitled to accrue \$3,675.41, an unpaid salary claim for the year 1939.

Petitioner was organized under the provisions of Section 607-610 of the 1928 Revised Code of Arizona, but during the year involved in this review was operating under the provisions of Chapter 36, Arizona Session Laws of 1937, now in Chapter 53 of the 1939 Arizona Code Annotated (see index).

The provisions of the 1937 law allowed the companies organized under the prior act to continue in business only on condition that they comply with the provisions of the 1937 act. The questions involved are those pertinent to the matter of income taxation of the Petitioner for the year 1937.

Specifications of Error.

I.

The Tax Court erred in its finding and judgment that Petitioner was not a life insurance company under the provisions of Section 201(a) of the Internal Revenue Act during the year 1939.

II.

The Tax Court erred in its finding and judgment that the Petitioner did not maintain a reserve fund which was held for the fulfillment of its contracts within the meaning of Section 201(a) of the Internal Revenue Act during the year 1939.

III.

The Tax Court erred in its finding and judgment that Petitioner was not entitled to a deduction of \$4,518.71 deposited with the Arizona State Treasurer during the taxable year under the provisions of Section 608b of the 1928 Arizona Statutes as amended in 1937 (Sec. 53-605, 1939 Ariz. Code Anno.), as provided in Section 207(c)(1)(A) of the Internal Revenue Act.

IV.

The Tax Court erred in its finding and judgment that Petitioner, if it is to be classified under Section 207 of the applicable Internal Revenue Law, is still not entitled to a deduction of funds held and received during the taxable year for the payment of expenses and losses as provided in Section 207(c)(3) of said act.

V.

The Tax Court erred in its finding and judgment that it was proper for the Respondent to accrue losses on deaths that occurred but were unreported at the end of the taxable year, without accruing unpaid salary claims for the same year.

ARGUMENT.

I.

Referring to Specification of Error No. I.

The Tax Court in its opinion sets out a brief history of the situation taken from *Helvering v. Oregon Mutual Life Ins. Co.*, 311 U. S. 267 [Tr. Rec. pp. 66 & 67], and we believe that a short excerpt from this case will clarify our position in the matter.

The Court in the above case had under consideration the matter of a deduction not of funds held for the fulfillment of its contracts but a deduction from interest earnings under the provisions of Section 203(a) of the Internal Revenue Act (a provision which has during the past two years resulted in exempting from taxation approximately sixty billion in *investment* income of large life insurance companies).

Petitioner is not contending for a deduction from investment income but only for that sum set aside out of premiums paid by policy holders to meet their future claims. However the history of the situation set out by the Court in the *Helvering* case, we believe reveals the purpose of the schedule for taxation of insurance companies, a portion of this statement reads as follows:

“Legislative history discloses that a deduction similar to that allowed by 203(a) first appeared in the Revenue Act of November 1921. . . . The new plan as it relates to life insurance companies *had as its major objective the elimination of premium receipts from the field of taxable income.* It had long been pointed out to Congress that the receipts except as to a very minor portion of each premium were not true income but were analogous to permanent capital investment.”

In enacting legislation with this principle in mind Congress set up a special schedule for the taxation of insurance companies. The enactments in regard to life insurance companies involved in this matter are found in Section 201(a) and Section 202 of the Internal Revenue Act, which during the applicable year read as follows:

Sec. 201 Tax On Life Insurance Companies.

(a) Definition—When used in this chapter the term “life insurance company” means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds.

The tax as applied to such companies is set out in Section 202 of the Internal Revenue Code, as follows:

Sec. 202. Gross Income of Life Insurance Companies. (a) Gross Income Defined. (1) In General.—In the case of a life insurance company the term “gross income” means the gross amount of income received during the taxable year from interest, dividends, and rents.

The Petitioner was during the year 1939 engaged in the business of life insurance and we do not understand that the Respondent contends that it was in any other business except as he states “*taxwise*.”

The general principle in regard to classification of a taxpayer for internal revenue taxation is that the tax-

payer should be classified according to the character of business in which he is engaged.

Bowers v. Lawyers Mortgage Co., 285 U. S. 182, 52 S. Ct. 350, 76 L. Ed. 690;

Weiss v. Stearn, 265 U. S. 242, 44 S. Ct. 490, 68 L. Ed. 1001, 33 A. L. R. 520;

Commissioner v. W. H. Luquire Burial Assn., 102 F. 2d 89.

In enacting a special schedule for life insurance companies Congress surely did not have in mind the granting of special favors to anyone but rather was recognizing the fact that life insurance companies are often engaged in other businesses than that of life insurance.

Where a life insurance company maintains reserves for other purposes than the contingency of death if such reserves such as those held for the endowment features of a contract are larger than those held to fulfill the death claim liability the company is not a life insurance company.

Helvering v. Intermountain Life Insurance Co., 294 U. S. 686, 690, 79 L. Ed. 1227;

Commissioner of Int. Rev. v. Ore. Mutual Life Ins. Co., 311 U. S. 267.

It was not the intention of Congress to give an exemption to any class of companies but rather to lay down a rule for classification according to the business transacted by the taxpayer. In *General Life Insurance Company v. Commissioner of Internal Revenue*, 137 F. 2d 191, the

United States Court of Appeals for the Fifth Circuit said in this regard:

“It is hardly conceivable that the policy of Congress was to exempt, large, old line, fixed premium life insurance companies, with its risks variedly spread over wide areas, and which had large reserves maintained by interest earnings, from taxation of premium income and to deny the benefit of the exemption, to younger, smaller and weaker life insurance companies with their risks largely localized and which had not yet built up a reserve in the event of serious local epidemics or disasters. To so hold would be to attribute to Congress a misdirected, discrimination in favor of the strong over the weak. To give effect to Treasury Department regulation No. 942 as construed and applied by the Commissioner, would tend to deny the benefits of the exemption to the companies that need it most. It is not thought that this was the intention of Congress.”

After the enactment of the law in the form in which it existed in 1939, the Treasury Department enacted its Regulation 94, Articles 201(a)1 and 203(a)(2)-1, which in effect required that the “reserves” set out in the definition must be reserves calculated on an adopted table of mortality or morbidity with an interest element, and that these reserves must be required by state law or by rules of an insurance department under the authority of a state law.

These regulations, in so far as they limit the provisions of the statute and deny the classification as life insurance companies those companies whose reserves are not so calculated or held and required by law, have been held in-

valid by a number of cases. In the following cases companies similar to the Petitioner herein have been held to be life insurance companies:

General Life Insurance Co. v. Commissioner of Int. Rev., 137 F. 2d 185;

Abilene Ins. Co. v. Commissioner of Int. Rev., 137 F. 2d 191;

American Insurance Co. of Texas v. Thomas, 146 F. 2d 434;

Employees of Swift & Co. v. Commissioner, 151 F. 2d 625;

Jones v. Oklahoma Benefit Ass'n, 151 F. 2d 505.

In the *Oklahoma Benefit Life Association* case cited above the United States Appellate Court for the Tenth Circuit held that this company was a life insurance company even though the interest its reserves earned could be used for operating expenses. In that case the Court said in part:

“It is true that the emergency fund maintained by the Association pursuant to 36 O.S.A. 1941, Par. 701, does not meet the technical requirements of a reserve fund such as is maintained by old line insurance companies. But Congress has never imposed technical requirements, such as actuarial computation, with respect to reserve funds of assessment companies. It is sufficient if it is a fund deposited with the state pursuant to law or maintained under the charter of the company or association exclusively for the payment of claims arising under certificates of membership or policies issued upon the assessment plan and not subject to any other use.”

Although dissenting from the majority opinion Judge Huxman agrees with the result arrived at and makes the following statement:

“The reason for this provision in the statute is quite apparent. Reserve funds do not belong to the company. They are the property of the policyholders. The company is the mere custodian of such funds for the policyholders. As stated by the Fifth Circuit in *General Life Ins. Co. v. Commissioner*, 137 F. 2d 185, ‘In a sense it partakes of the nature of an inchoate trust for the benefit of the policyholders.’”

That the above situation is the case in regard to Petitioner herein we refer to the testimony of the witness M. C. Reese. [Tr. Rec. pp. 30 & 31.]

The witness testified that in March of 1947 the First National Benefit Society “went Legal Reserve.” That a stock company was organized out of the expense savings of the Benefit Society and that shares of stock were distributed to each member of the society in proportion to the amount of premium paid by each policyholder, that a \$100,000.00 deposit was made with the state treasurer, so that the policy holders of the benefit society are the owners of shares in the Legal Reserve Company in direct proportion to the amount they had contributed to the funds of the benefit society. He testified further that the First National Life Insurance Company has assumed the assets of the benefit society and its liabilities including its tax liabilities.

II.

Referring to Specification of Error No. II.

Section 609 of the 1937 Arizona Benefit Corporation Act (now Sec. 53-609, 1939 Ariz. Code Anno.), provides for a reserve fund. This section has been construed by the Arizona Supreme Court in *Pioneer Mutual Benefit Association v. Corporation Commission*, 123 P. 2d 828, in which the Court held that the requirement of the Arizona Corporation Commission that 50 per centum of of the premiums must be placed in a mortuary fund for the benefit of the company's certificate holders was valid and authorized. The Court said in part:

“The requirement that such a statement be inserted in all benefit certificates automatically creates a mortuary or reserve fund, because the Legislature certainly did not impose this duty upon a benefit corporation and then permit it to set aside the amount named to that fund provided it saw fit to do so.”

And in the same case the Court also said:

“The Legislature has in the Benefit Corporation law reposed upon the Corporation Commission the duty of seeing to it that the premiums paid for benefit certificates (insurance policies) are sufficient to pay benefit claims.”

The words “insurance policies” in parenthesis above are the Court's. It is the gist of this case that the regulations of the Corporation Commission requiring a definite amount of premium to be placed in the mortuary fund for the benefit of the policy holders is valid.

We wish to call the Court's attention to the fact that the requirements of the definition of a life insurance company refer to the amount of fifty per centum of the company's total reserve funds and not to the percentage of premiums allotted to those funds.

In the case of *First National Benefit Society v. W. P. Stuart*, 134 F. 2d 438, the Court in its decision had said that the law of Arizona did not require the maintenance by appellant of any reserve fund; however a petition for rehearing was filed by attorneys for a number of benefit societies who then had pending an appeal to the United States Tax Court, because a portion of the year 1937 was involved in the said suit and the Arizona Benefit Corporation Law had gone into effect during that year. After consideration of the petition the Court entered an order modifying its original opinion as follows:

“Good cause therefor appearing, It is ordered that the opinion of this court heretofore rendered filed on March 8, 1943, be amended by striking from the first paragraph commencing on page 2 the following sentence: ‘The Arizona statutes do not require the maintenance by appellant of any reserve fund.’”

It is the contention of the petitioner therefore that its reserves fulfill all the requirements of the definition enacted by Congress in Section 201(a) of the Internal Revenue Code and that in so far as the Treasury Department regulations add to or limit these requirements they are invalid.

III.

Referring to Specification of Error No. III.

Section 202(b) of the 1939 Internal Revenue Code reads as follows:

“(b) Reserve Funds Required by Law Defined.—The term ‘reserve funds required by law’ includes in the case of assessment insurance, sums actually deposited by any company or association with the State or Territorial officers pursuant to law as guaranty or reserve funds, and any funds maintained under the charter or articles of incorporation of the company or association exclusively for the payment of claims arising under certificates of membership or policies issued upon the assessment plan and not subject to any other use.”

If Petitioner is not an ordinary life insurance company it would be an assessment life insurance company. In determining this matter with a similar company involved and as to whether the company was an assessment company in relation to the very type of reserves here involved in *General Life Insurance Company v. Commissioner*, 137 F. 2d 185, the United States Court of Appeals for the Fifth Circuit held that although the Articles of Incorporation did not in words provide for the reserves, that the laws of Texas were a part of those Articles, the Court said:

“Pertinent parts of the law of the state of creation of a corporation are as much a part of its articles of incorporation as if the provisions were expressly written into the articles.”

In Appleman's treatise on Insurance Vol. 1, Paragraph 12, the author states that even where advance deposits are fixed and regular premiums collected that if the insurer has the right to call for assessments that such a system is still assessment insurance.

Section 607 of the 1937 Benefit Corporation Law (Sec. 53-602, 1939 Ariz. Code Anno.) provides for corporations, societies or associations where funds are provided by mutual contributions, periodical payments, dues or assessments.

The premium receipts of Petitioner are set up as "dues" and "assessments," the assessments being set up and credited to the mortuary fund.

See Paragraph 9 of the Stipulation of Facts herein and Petitioner's Exhibit 5 attached thereto [Tr. Rec. p. 53].

All the policies issued by Petitioner to and including the year 1937, contained the following clause:

"This Corporation is organized as a Death Benefit Society and operating under the provisions of Sections 607, 608, 609, 610 of Chapter XIV of Article 3 of the 1928 Revised Statutes and Amendments of the State of Arizona, and reserves all rights in accordance with law. Annual meeting is held without call at 2 P.M. on the second Saturday of January of each year."

Petitioner should therefore be entitled to a deduction of \$4,518.71 deposited with the State Treasurer, during the year 1937, and since these funds were held for the fulfillment of its life insurance contracts as were required by law to be deposited with the State Treasurer for protection of the certificate holders.

IV.

Referring to Specification of Error No. IV.

If Petitioner is to be classified under Section 207, as the Commissioner has classified it, then it would be entitled to a deduction under the provisions of Section 207(c)(3) of the act, which reads as follows:

“MUTUAL INSURANCE COMPANIES OTHER THAN LIFE AND MARINE. In the case of mutual insurance companies (including interinsurers and reciprocal underwriters, but not including mutual life or mutual marine insurance companies) requiring their members to make premium deposits to provide for losses and expenses, the amount of premium deposits returned to their policyholders *and the amount of premium deposits retained for the payment of losses, expenses, and reinsurance reserves.*” (The emphasis above is ours.)

In the case of *American Ins. Co. of Texas v. Thomas*, 146 F. 2d 434, cited above, the question before the Court was as to this deduction and the majority of the Fifth Circuit Court of Appeals held that this particular company was not a mutual, but held that regardless of that fact, they held that funds set aside for the payment of expenses and losses were not taxable and that they were not income, and that they constituted unearned premiums. In deciding this case the Court said as follows in part:

“Whatever part of the taxed sums as were derived from insurance premiums and were a part of the increase in the Mortuary Fund of Appellant should have been held to be unearned premiums and deductible from the underwriting income even though the Appellant was not a mutual insurance company.”

In a separate concurring opinion Judge Hutcheson said:

“While I do not agree with the majority that appellant was not a mutual insurance company, I concur in this view that if it was not such company, the sums taxed in each year represented unearned premiums received by an insurance company other than mutual or marine, and were therefore not taxable. While this concurrence reverses the case, I think I should give my reasons for saying that I cannot concur in the conclusion against mutuality. Out of a non-existent and purely imaginary large profit which the managers of the company might make but have not made and apparently will never make, the district judge and my brethren have evoked the specter of a condition which does not exist to deprive appellant of the mutuality it enjoys by statute and in fact.”

It would appear therefore that the additions which this Petitioner has made to its reserves held against an ever increasing liability as its policy holders grow older a part of which was required by law to be placed with the State of Arizona, and all of which was required by law to be placed in a Mortuary Fund, that even if these funds constituted no reserve at all, they do constitute money held in trust for the policy holders, contributed by them and belonging to them and held to take care of their future needs. These policy holders paid income taxes on these funds as they acquired them and they now under all decisions in regard thereto constitute, if not technical life insurance reserves, unearned premiums and hence, deductible under the above section.

A considerable portion of these funds also made during the latter part of the year where a six month or annual premium is paid are advanced premiums on risks during the coming year.

V.

Referring to Specification of Error No. V.

The Commissioner should not accrue a portion of the claims against Petitioner and leave unaccrued another claim, unpaid for the sole reason that there were not available funds to pay it.

It is true that the Petitioner filed its income tax return on a cash basis, but each year the Commissioner has accrued the unpaid claims reported at the close of the year but upon which proofs of claim had not been made and then instead of accruing all unpaid claims left unaccrued the unpaid salary claim of M. C. Reese.

It should be noted that during the year 1939, there was transferred from the expense funds of the Petitioner to the mortuary fund the sum of \$3000.00 in connection with the salary account although due was not paid in full.

Petitioner therefore contends that the decision of the United States Tax Court should be reversed and the case remanded with instructions to enter judgment for Petitioner.

Respectfully submitted,

ROBERT R. WEAVER,

Attorney for Petitioner.

APPENDIX.

ARIZONA REVISED CODE OF 1928.

607. **BENEFIT SOCIETIES; LIMITATIONS.** Associations may be formed for the purpose of paying to the nominee of any member a sum upon the death of said member not exceeding three dollars for each member of such association. No such association shall exceed in number, five thousand persons.

608. **FORMATION.** Such association shall be formed by filing a verified certificate in the office of the recorder of the county in which the principal place of business is to be situated, and filing a like certificate in the office of the corporation commission; such certificate shall state the general objects of the association, its principal place of business and the names of the officers selected to hold for the first three months, and shall be signed by the said officers and verified by at least three of them.

609. **ASSESSMENTS.** Said association, upon the death of any member, may levy an assessment, not exceeding three dollars, upon each living member, and collect and pay the same to the nominee of such deceased, and may also provide for annual assessments upon any one member not to be raised above that established at the time such member joined the association.

610. **POWERS: NOT CONTROLLED BY INSURANCE LAWS.** Such association may sue and be sued by its name, may loan its funds and own sufficient real property for its business purposes, and such other real property as it may purchase on foreclosure of its mortgages. Such property so obtained through foreclosure shall be sold and conveyed within five years from the day title is obtained, unless the superior court of the proper county shall, upon petition

and good cause shown, extend the time. Such association may make such by-laws as may be necessary for its government and for the transaction of its business, and shall not be subject to the provisions of the general insurance laws.

CHAPTER 36, ARIZONA SESSION LAWS OF 1937.

Section 1. SHORT TITLE. This act may be cited as the benefit corporation law of 1937. (Now section 53-601, Arizona Code, 1939.)

Section 2. Section 607, Revised Code of 1928, is amended to read:

607. BENEFIT CORPORATIONS. Corporations, not for pecuniary profit, may be formed to provide cash benefits for members and cash benefits for the nominees of deceased members, and shall include all corporations, societies and associations operating an insurance business where funds are provided by mutual contributions, periodical payments, dues or assessments, except those hereinafter exempted. (Now section 53602, Arizona Code, 1939.)

Sec. 3. Sec. 608, Revised Code of 1928, is amended to read:

608. FORMATION. (a) Two hundred or more citizens of the United States, residents of this state for at least one year, may form a benefit corporation by filing articles of incorporation, verified by each of them stating the general objects of the corporation, its principal place of business, the time of its commencement and termination, the names of the directors and officers by whom the affairs of the corporation are to be conducted and the time of their election, the corporation's name (which shall indicate its

general character of business and shall not closely resemble the name of any association, life insurance company, or corporation now licensed to do business in this state), and whether private property is to be exempted from liability for the corporate debts. Now Section 53603(a), A. C. 1939.)

(b) When the articles of incorporation have been thus filed and a certified copy thereof recorded in the office of the county recorder of the county in which its place of business is situated, and appointment of a statutory agent filed, the corporation commission shall issue the corporation a certificate of incorporation. (Now section 53-603 (b), A. C. 1939.)

Sec. 4. Article 3, Chapter 14, Revised Code of 1928, is amended by adding section 608a.

608a. MINIMUM MEMBERSHIP. Such corporation shall have twelve months from the date of its certificate of authority to secure a minimum of not less than five hundred members in good standing. Should the membership at any time fall below said minimum, the corporation shall immediately notify the corporation commission. Within ninety days thereafter, or such further time as the commission may allow, the corporation shall increase its membership to said minimum. If the corporation fails to increase its membership within the time fixed, the commission shall revoke its certificate of authority and thereupon such corporation shall liquidate and dissolve. (Now section 53-604, A. C. 1939.)

Sec. 5. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 608b:

608b. DEPOSIT OF MONEY OR SECURITY. (a) Every benefit corporation organized or operating under the pro-

visions of this act, before receiving a certificate of authority to transact business, shall, in addition to the requirements of section 609b, deposit with the state treasurer, to be by him held in trust for the benefit and protection of the corporation's members, the sum of one thousand dollars. Thereafter a further sum of one thousand dollars, divided into twelve equal monthly payments, beginning thirty days after the certificate of authority is issued, shall be likewise deposited with the state treasurer. Failure to pay any such monthly payments shall automatically cancel the corporation's certificate of authority. (Now section 53-605, A. C. 1939.)

(b) In addition to said deposits every such corporation shall, not later than February 1, 1940, and on or before February 1 of each year thereafter, deposit with the state treasurer, to be by him held in trust as hereinafter provided, for the benefit and protection of the members of the corporation, a further sum equal to one dollar for each one thousand dollars of protection in force on December 31 of the preceding year, beginning as of December 31, 1939, until a total of ten thousand dollars has been so deposited. (Now section 53-605(b), A. C. 1939.)

(c) The deposits prescribed by this section shall be subject to withdrawal from the state treasury in whole or in part only on the order of and as directed by the corporation commission, but may, with the commission's approval, be invested in United States or state bonds, which shall be placed with and assigned to the state treasurer and held by him as provided for the original deposits. Subject to approval by the commission any such securities may be exchanged for others of like amounts. The interest on said securities shall be payable to the corporation depositing the same. (Now section 53-605(c), A. C. 1939.)

(d) Any unsettled final judgment of a court of this state shall be a lien on the deposits of money or securities prescribed by section 608b, and subject to execution after thirty days from entry of final judgment. If said deposit is depleted thereby it shall be replenished within ninety days. (Now section 53-605(d), A. C. 1939.)

(e) Said deposit may be considered as a part of any required reserve of the corporation and shall not be subject to withdrawal so long as the corporation has any contract or other liability outstanding. If and when the corporation liquidates, dissolves, or merges with another corporation, and there are no certificates or other liabilities not satisfied or assumed, the deposit shall be returned to the corporation upon the order of the commission, and placed to the credit of the fund from which it was taken or paid to the person who may have advanced it. (Now section 53-605(e), A. C. 1939.)

Sec. Article 3, Chapter 14, Revised Code of 1928, amended by adding section 608c:

608c. BENEFIT CERTIFICATE. (a) Every benefit certificate issued by any such corporation shall specify the maximum amount not exceeding five thousand dollars, on the life of any individual, to be paid on the happening of the contingency therein stated, and shall state the basis or amount to be set aside to the mortuary and reserve fund. The certificate, including any written amendment thereto, and, at the option of the corporation, the application therefor, and the by-laws of the corporation, shall constitute the entire contract between the corporation and the member, and the applicant shall see that all facts required to be stated are set forth in the application. (Now section 53-606(a), A. C. 1939.)

(b) Each corporation shall provide in its certificate for at least fifteen days' grace following the due date of any periodical payment or dues, during which time the certificate shall not be forfeited. If payments are not made according to the terms of the certificate all liability of the member and of the corporation ceases, except as otherwise provided in the certificate. Any corporation may provide for a period of time, which shall be stated in the certificate, for the reinstatement of a lapsed or forfeited certificate, and for a reinstatement fee. If the corporation requires a written application for reinstatement such application shall be the basis of renewing the contract, and any statement made therein may be used by the corporation in defense of its rights under the certificate. (Now section 53-606(b), A. C. 1939.)

Sec. 7. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 608d:

608d. FIDELITY BOND. The president, vice-president, or treasurer of every benefit corporation shall furnish a fidelity bond of a company authorized to transact business in the state, in the amount of five thousand dollars, payable to the corporation. (Now section 53-607, A. C. 1939.)

Sec. 8. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 608e:

608e. LIABILITY LIMITED. The private property of the officers, directors, members, beneficiaries, or employees of any benefit corporation organized under the provisions of this act shall not be liable for the payment of the debts of the corporation. (Now section 53-608, A. C. 1939.)

Sec. 9. Sec. 609, Revised Code of 1928, is amended to read:

609. PAYMENTS AND FUNDS. (a) Every benefit corporation shall provide in its benefit certificate for periodical payments or dues sufficient to pay benefit claims and general operating expenses as stipulated therein. (Now section 53-609(a), A. C. 1939.)

(b) A mortuary and reserve fund, exclusive of other assets, may be created, out of which may be paid all benefit claims arising under the certificates, the deposits required to be made with the state treasurer as provided by section 608b, and attorney's fees and necessary expenses arising out of the defense, settlement, or payment of any contested or disputed claim. The residue of payments made by members, after setting aside the amount required for the mortuary and reserve fund, and interest earned by the assets of the corporation, whether deposited with the state treasurer or otherwise invested, may be used for general operating expenses. (Now section 53-609(b), A. C. 1939.)

Sec. 10. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609a:

609a. EXAMINATION. At least once in every two years the corporation commission shall require the books and affairs of each benefit corporation to be examined and audited by an accountant designated and commissioned by it, for the purpose of verifying the funds as provided in the benefit certificate thereof. For such purpose the commission and its auditor shall have free access to all books, papers and accounts of the corporation. The cost of any such examination and audit shall be paid by the corporation, but it shall not be required to pay for more than one

such examination and audit in any one year, nor to exceed twenty-five dollars for each one thousand certificates or fraction thereof in force at the time of such examination except that a corporation chartered under the laws of another state shall also pay the traveling expenses of the accountant designated by the commission. All such costs shall be paid upon the completion of the audit or examination. (Now section 53-610, A. C. 1939.)

Sec. 11. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609b:

Sec. 609b. CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS. (a) Before any benefit corporation shall solicit applications for benefit certificates it shall file a copy of its certificate with the corporation commission and evidence that it has made the deposit required by section 608c. If the certificate conforms to the requirements of this act, the commission shall within three days issue a written certificate of authority to the corporation to transact business. (Now section 53-611(a), A. C. 1939.)

(b) Upon presentation to the commission of *prima facie* evidence that any benefit corporation is wilfully violating the provisions of this act, the commission shall immediately notify such corporation, stating the manner in which it is alleged the law is being violated. If it appears to the commission that the corporation is continuing such violation, it shall cite the corporation to appear within thirty days to show cause why the alleged violations should not be remedied. If upon said hearing the commission shall find that the corporation is violating the provisions of this act in the particulars stated in the citation, it shall serve a written notice of its decision upon the corporation, which shall be subject to the rights of appeal hereinafter provided. Should the corporation not appeal

from such decision, or if it appeal the appellate court shall uphold the decision of the commission, the corporation shall comply with the order of the commission within ten days thereafter, and upon its failure so to do, the commission may revoke the certificate of authority of such corporation. (Now section 53-611, A. C. 1939.)

Sec. 12. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609c:

609c. EXEMPTION FROM ATTACHMENT. No money paid or to be paid for any benefit, as provided in a certificate issued by a corporation organized or operating under the provisions of this act, shall be liable to attachment or other process, nor may it be seized, taken, appropriated or applied by any legal or equitable process, nor by operation of law to pay any debt or liability of any member or his nominee, except as may be provided in the benefit certificate. (Now section 53-612, A. C. 1939.)

Sec. 13. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609d:

609d. ORGANIZATIONS EXEMPTED. The provisions of this act shall not apply to secret or fraternal societies, lodges, or councils, which conduct their business and secure members on the lodge system exclusively, and having a ritualistic work and ceremonies in their societies, lodges, or councils, nor to any mutual or benefit association organized or formed and composed exclusively of members of any such society, lodge, or council, church or religious society, nor to any association of employees employed by one and the same concern, or its subsidiary, nor any labor organization, nor to any life insurance company labor organization, nor to any life insurance company organized or operating under chapter 36, Revised Code of 1928, nor

to any foreign assessment company operating under the general insurance laws of this state. (Now section 53-613, A. C. 1939.)

Sec. 14. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 609e:

609e. NO VESTED PROPERTY RIGHT. No member of a benefit corporation shall have any vested property right or title in any deposits or reserve during the life time of the member, other than as provided in the benefit certificate. (Now section 53-614, A. C. 1939.)

Sec. 15. Sec. 610, Revised Code of 1928, is amended to read:

610. POWERS OF BENEFIT CORPORATIONS. Any corporation organized under the provisions of this act may contract, sue and be sued by and in its own name, and shall not be subject to the provisions of the general insurance laws, and no law hereafter enacted shall apply to such corporations unless they are expressly designated therein. They may own sufficient real property for their business purposes and such other real property as they may purchase upon foreclosure of their mortgages. Property obtained through foreclosure shall be sold and conveyed within five years from the date title is obtained unless the superior court of the county in which the principal place of business of the corporation is located, shall, upon petition and for good cause shown, extend the time for such sale and conveyance. Such corporation may make and amend necessary by-laws, which shall provide for annual meetings of members who may vote in person or by proxy. The by-laws or the benefit certificate may provide for the qualification of members, mode of acceptance, the fees of admission and periodical payments

or dues, the expulsion of members for non-payment of any periodical payment or dues, the restoration to membership, the employment and compensation of its agents and other regulations not in violation of this act. (Now section 53-615, A. C. 1939.)

Sec. 16. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610a:

610a. EXISTING CORPORATIONS. Any existing corporations under the provisions of sections 607, 608, 609 and 610, article 3, chapter 14, Revised Code of 1928, shall be deemed to be lawfully incorporated, organized and existing and may continue its corporate existence and transact business under, and avail itself of the provisions hereof without reincorporating or requalifying, except that such corporation shall, on or before January 1, 1938, comply with the provisions hereof as to statutory agent, minimum membership, deposits of money or securities, benefit certificate, fidelity bond, and certificate of authority, and shall be subject to examination as herein provided. (Now section 53-616, A. C. 1939.)

Sec. 17. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610b:

610b. FOREIGN ORGANIZATIONS. No benefit corporation, association, or society incorporated or transacting business under the laws of any other state or foreign country, shall transact business in this state until it complies with the requirements of this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction punished by a fine of not more than five hundred dollars, imprisonment in the county jail for not more than six months, or both. (Now section 53-617, A. C. 1939.)

Sec. 18. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610c:

610c. FILING FEES. The fees for the filing of instruments and documents pertaining to the organization of benefit corporations shall be the same as the fees provided for filing of like instruments and documents with the corporation commission. (Now section 53-618, A. C. 1939.)

Sec. 19. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610d:

610d. CONTESTABILITY. (a) All certificates issued by a benefit corporation shall be incontestable after three years from their effective date or three years from the effective date of any reinstatement after lapse, except for non-payment of assessment levied.

(b) To contest the validity of a certificate, or deny liability thereunder, the corporation shall notify the member, or if the member is dead, the beneficiary, by registered letter addressed to such member or beneficiary at the last address known to the corporation. (Now section 53-619, A. C. 1939.)

Sec. 20. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610e:

610e. APPEAL. Any decision of the corporation commission may, within sixty days after the same has been served on a benefit corporation, be appealed to the superior court of the county in which the principal place of business of such corporation is located. Notice of appeal and a statement of objection to the commission's decision shall be filed with the commission, which shall, within sixty days after the appeal has been filed, transmit a copy of such notice and statement, with a certified copy of the

proceedings before the commission, including a transcript of testimony and all exhibits, to the clerk of the superior court, who shall docket the appeal in the name of the appellant as plaintiff and the corporation commission as defendant. The superior court shall hear such appeal, with or without jury, unless both parties shall file an agreement to a continuance. Either the corporation commission or any such corporation or proposed corporation may appeal from the judgment of the superior court to the supreme court. (Now section 53-620, A. C. 1939.)

Sec. 21. Article 3, chapter 14, Revised Code of 1928, is amended by adding section 610f:

610f. PENALTIES. Any solicitor, agent, examining physician, or other persons who wilfully makes any false or fraudulent statement or misrepresentation in or with reference to any application for benefit or for the purpose of obtaining any money or benefit in or to any corporation transacting business under this act, or any officer of any such corporation who refuses to permit the corporation commission or its auditor to make an examination and audit of the business, books, or records of such corporation, or who wilfully violates any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by fine of not more than five hundred dollars, imprisonment in the county jail not more than six months, or both. (Now section 53-621, A. C. 1939.)

Sec. 22. SEVERABILITY. If any provision of this act be held invalid, such invalidity shall not affect other provisions which can be given effect without the invalid provision, and to this end the provisions of the act are declared to be severable. (Now section 53-622, A. C. 1939.)

No. 12,433

In the United States Court of Appeals
for the Ninth Circuit

FIRST NATIONAL BENEFIT SOCIETY, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
I. HENRY KUTZ,
*Special Assistants to the
Attorney General.*

FILED

MAY 3 - 1950

PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved.....	2
Statement	2
Summary of Argument	9
Argument:	
I. Taxpayer was not a life insurance company in the taxable year within the the meaning of Section 201 (a) of the Internal Revenue Code	13
II. The payments made by taxpayer within the taxable year to the Arizona State Treasurer did not constitute a net addition required by law to be made within the taxable year to reserve funds within the meaning of Section 207 (c)(1)(A) of the Code, and hence were properly held not deductible by the Tax Court.....	24
III. Taxpayer failed to establish that it was entitled to additional deduction under Section 207 (c)(3).....	26
IV. Taxpayer, being on the cash basis, is not entitled to deduct the accrued, but unpaid, portion of its president's salary	27
Conclusion	31
Appendix	32

CITATIONS

Cases:

<i>Abilene Life Ins. Co. v. Commissioner</i> , 137 F. 2d 191.....	23
<i>American Ins. Co. of Texas v. Thomas</i> , 146 F. 2d 434.....	23
<i>Cassatt v. Commissioner</i> , 137 F. 2d 745.....	30
<i>Commissioner v. Monarch Life Ins. Co.</i> , 114 F. 2d 314.....	17
<i>Commissioner v. National Reserve Ins. Co.</i> , 16 F. 2d 956.....	10, 15
<i>First Nat. Ben. Soc. v. Stuart</i> , 134 F. 2d 438, certiorari denied, 320 U. S. 211	9, 18
<i>First Nat. Ben. Soc. v. Stuart</i> , 152 F. 2d 298, certiorari denied, 328 U. S. 847.....	9, 17
<i>General Life Ins. Co. v. Commissioner</i> , 137 F. 2d 185.....	18
<i>Grand Rapids & I. R. Co. v. Blanchard</i> , 38 F. 2d 470.....	14
<i>Helvering v. Inter-Mountain Life Ins. Co.</i> , 294 U. S. 686.....	17, 27
<i>Helvering v. Oregon Ins. Co.</i> , 311 U. S. 267.....	16
<i>Jones v. Oklahoma Ben. Life Ass'n</i> , 151 F. 2d 505.....	23
<i>Maryland Casualty Co. v. United States</i> , 251 U. S. 343.....	22
<i>Swit & Company Employees Benefit Ass'n v. Commissioner</i> , 151 F. 2d 625	23
<i>Your Health Club, Inc. v. Commissioner</i> , 4 T.C. 385.....	30

Statutes:

4 Arizona Code Annotated (1939), c. 53, Art. 6:

Sec. 53-601	15, 34
Sec. 53-602	34
Sec. 53-603	35
Sec. 53-605	35
Sec. 53-606	37
Sec. 53-609	37
Sec. 53-613	38
Sec. 53-615	38
Sec. 53-616	39

Internal Revenue Code:

Sec. 41 (26 U.S.C. 1946 ed., Sec. 41)	32
Sec. 43 (26 U.S.C. 1946 ed., Sec. 43)	29
Sec. 201 (26 U.S.C. 1946 ed., Sec. 201)	32
Sec. 202 (26 U.S.C. 1946 ed., Sec. 202)	32
Sec. 203 (26 U.S.C. 1946 ed., Sec. 203)	33
Sec. 204 (26 U.S.C. 1946 ed., Sec. 204)	16
Sec. 207 (26 U.S.C. 1946 ed., Sec. 207)	33

Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 163

Revised Code of Arizona (1928), c. 14, Art. 3:

Sec. 607	20, 39
Sec. 608	20, 39
Sec. 609	20, 39
Sec. 610	20, 40

Miscellaneous:

H. Rep. No. 2333, 77th Cong., 2d Sess., p. 109 (1942-2 Cum. Bull. 372)	22
---	----

Treasury Regulations 62:

Art. 661	21
Art. 681	21

Treasury Regulations 65:

Art. 661	21
Art. 681	21

Treasury Regulations 69:

Art. 661	21
Art. 681	21

Treasury Regulations 74:

Art. 951	21
Art. 971	21

Miscellaneous—Continued

Treasury Regulations 77:		Page
Art. 951		21
Art. 971		21
Treasury Regulations 86:		
Art. 201 (a)-1		21
Art. 203 (a) (2)-1		21
Treasury Regulations 94:		
Art. 201 (a)-1		21
Art. 203 (a) (2)-1		21
Treasury Regulations 101:		
Art. 201 (a)-1		21
Art. 203 (a) (2)-1		21
Treasury Regulations 103:		
Sec. 19.41-1		40
Sec. 19.41-2		41
Sec. 19.43-1		29
Sec. 19.201(a)-1		41
Sec. 19.203(a) (2)-1	22,	41
Sec. 19.207-2		42
Sec. 19.207-3		43
Sec. 19.207-4		43
Sec. 19.207-6		44

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,433

FIRST NATIONAL BENEFIT SOCIETY, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 54-75) is not reported.

JURISDICTION

This petition for review (R. 76-79) involves federal income tax for the year 1939. The Commissioner determined a deficiency for that year in the amount of \$1,135.83. (R. 55.) Notice of the asserted deficiency was mailed by the Commissioner of Internal Revenue on March 14, 1947 (R. 12); and within ninety days thereafter, and on June 9, 1947 (R. 2), petition for review was filed with the Tax Court for redetermination under the provisions of Section 272 of the Internal Revenue Code. The decision of the Tax Court, sus-

taining the Commissioner, was entered September 13, 1949. (R. 76.)

The case was brought to this Court by taxpayer's petition for review filed November 29, 1949 (R. 76-80), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948, and Section 1142, within three months after the Tax Court's decision was rendered.

QUESTIONS PRESENTED

1. Was taxpayer during the year 1939 a life insurance company within the meaning of Section 201 of the Internal Revenue Code?

2. If taxpayer was a mutual insurance company other than life, did the Tax Court err in ruling that the payments made by taxpayer to the State Treasurer of Arizona during the taxable year did not constitute a net addition required by law to be made to reserve funds, and thus not deductible, within the meaning of Section 207 (c)(1)(A) of the Internal Revenue Code?

3. Was taxpayer entitled to an additional deduction under Section 207 (c)(3) of the Code for alleged premium deposits retained for payment of losses, expenses and reinsurance reserves?

4. Was taxpayer, on the cash basis, entitled to deduct the accrued but unpaid portion of its president's salary?

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appendix, *infra*.

STATEMENT

The Tax Court found the facts as follows (R. 55-64):

The taxpayer is a corporation organized and existing under and by virtue of the laws of the State of

Arizona. The taxpayer filed its federal income tax return for the calendar year 1939 with the Collector of Internal Revenue for the District of Arizona. On its return the taxpayer reported no tax liability. (R. 56.)

During the period involved, the taxpayer was engaged in business under the "Benefit Corporation Law of 1937" of the State of Arizona, being Chapter 36 of the Arizona Session Laws of 1937, and incorporated in the Arizona Code of 1939 as Sections 53-601 to 53-622, inclusive. Its purpose was (R. 56)—

That the objects and purposes for which said Corporation is formed are: To engage in, conduct and carry on the business and customary activities of a mutual benefit association within the meaning and provisions of Sections 607-608-609-610 of Chapter 14 of Article 3 of the 1928 Revised Statutes of the State of Arizona as the same now exists; * * *

In the articles of incorporation, the taxpayer is given authority to issue certificates of membership in assessment form and guaranteed cost certificates of various types. Its contractual liabilities "upon any one member" was specifically limited in both cases. Its funds were denominated (1) Benefit Fund, (2) General Fund, and (3) Reserve Fund and/or Trust Fund. The funds were described as follows (R. 56-57):

Benefit Fund and/or Reserve Fund and/or Trust Fund: The Benefit Fund and/or Reserve Fund and/or Trust Fund of the Corporation, consisting of those moneys received shall be used for the purpose of payment of claims originating under and in connection with claims pertaining to all certificate forms, and in addition thereto such funds shall be charged a nominal amount for each claim in connection therewith as expense money as so allocated by all contracts of membership. Such amount to

be determined from time to time as the Board of Directors may deem advisable.

General Fund: The General Fund consisting of the membership fee, semiannual dues, and other portions of money so allocated to said fund from any source whatsoever, and shall be used for general administration purposes of the business in its entirety except payments of death claims, and the General Fund of the Corporation shall in no way be subject for use of payment of any death claims unless at the discretion of the Board of Directors.

Reserve Fund and/or Trust Fund: The Reserve Fund shall be distributed to the Benefit Fund and consist of those moneys allocated to such fund as so specified in the Guaranteed Cost certificates of membership, and such fund shall be used for payment of death claims as so specified membership certificates; and in addition thereto such funds shall be charged a nominal amount for each claim in connection therewith, as expense money as so allowed by all contract of membership. Such amount to be determined from time to time as the Board of Directors may deem advisable.

The scope of the taxpayer's funds was set forth as follows (R. 58-59) :

Section I. The funds of the Society which consist of the following: The Benefit Fund and/or Reserve Fund and/or Trust Fund, and such other funds as the Board of Directors may hereafter from time to time determine and establish. A separate accounting for such funds shall be kept in the books of the Society.

Section II. Benefit Fund, and/or Reserve Fund, and/or Trust Fund: The Benefit Fund, and/or Reserve Fund, and/or Trust Fund, which consist of all moneys paid to or coming into the possession of the Society, during the notice period allowed in the certificate and notice for the payment of death assessments made from time to time by order of or

direction of the Board of Directors for the purpose of paying death claims of members, taxes and other necessary expenses incurred in the administration and defense of said fund.

Section III. General Fund: The General Fund which shall consist of such amounts so specified as dues and other renewal moneys collected after the notice period allowed in the certificate and notice for the payment of the death assessments shall be used to defray expenses incidental to the operation of the Society, including salaries, rentals, printing, postage, etc.

Section IV. Reserve Fund and/or Trust Fund: The Reserve Fund and/or Trust Fund, shall consist of those moneys allocated to such fund as so specified in certificate of membership so issued by the Corporation. Such moneys shall be used for payment of death claims in accordance with the terms of the membership certificates and for taxes and other necessary expenses incurred in the administration and defense of said fund.

By amendments to its by-laws the taxpayer was authorized to issue various certificates called Guaranteed Reserve, Juvenile, Family Burial, Family Group, Accident and Health, Joint policy, "Penny a day life", Death Benefit, etc., and various modifications of the certificates already authorized. (R. 59.)

The taxpayer issued Forms H, XXX, XXX-GG, XXX-J, XXX-FG, and A-H-1 typical of membership certificates and insurance policies issued by it during 1939. All of these policies were designated "Guaranteed Reserve Certificates". In all of them appears the provision, "The member shall not be liable for any debts of the Corporation or for any other obligations save and except the premium deposits required hereon and then only so long as the Certificate remains in force and effect". Form H covered death from any cause;

Form XXX covered natural and accidental death and loss of limb; Form XXX-GG covered natural death of member and accidental death of member and beneficiary; Form XXX-J covered natural and accidental death of member and co-member; Form XXX-FG covered natural and accidental death of the member and dependents, while Form A-H-1 covered accidental loss of life and limb, disability benefits, etc. Each policy provided that premium deposits after one year from the date of the policy should consist of the certificate fee and general fund dues and after the payment of the general fund dues the remainder of such deposits should "be placed in a Trust Fund for distribution to the Mortuary Fund as required"; except Form A-H-1 which required the remainder to be distributed to the "claim fund". (R. 59-60:)

All policies contained the clause (R. 60):

Reserve: The By-Laws of the Corporation require the deposit in an amount not less than fifty per cent (50) of each premium deposit for the purpose of payment of claims and expenses incidental thereto.

The type and number of policies issued by the taxpayer and in force, as of May 31, 1939, were as follows (R. 60):

Type	Number of Policies
Assessment Form	34
Individual	7,253
Family group	2,369
Joint	685
Juvenile	219
Health and Accident	249
Penny a Day	181
Total	<hr/> 10,990

The taxpayer's income during the calendar year 1939 was entirely from premium payments and none of its income was from interest, dividends or rents. (R. 61.)

On June 30, 1937, the taxpayer's board of directors, consisting of M. C. Reese, M. S. Reese and C. W. Reese, authorized the taxpayer to employ M. C. Reese as its general manager for a term of twenty years and pay him for his services a sum equal to ten per cent of the taxpayer's gross income. During the year 1939 Reese earned \$18,075.11 pursuant to the employment contract but was paid only \$12,000, leaving a sum of \$6,075.11 on its books as due to him. (R. 61.)

The taxpayer maintained only one bank account in which all its receipts were placed. No attempt was made by the taxpayer to separate the various expense and reserve funds. The actual segregation was shown only on its books. Its books were maintained on a cash basis and its income tax return was filed on that basis. (R. 61.)

Prior to and during the taxable year the taxpayer relied on its annual premium receipts to pay its current expenditures, including claims. Prior to March, 1947, when the taxpayer became a legal reserve company, no valuation was made of individual policies as a basis of determining the proper legal reserve. As the taxpayer now operates, the policy reserves must build themselves up with interest increases. (R. 61.)

In all its years of operation the taxpayer never levied any assessments against its members or policyholders. (R. 62.)

In showing the financial status of the taxpayer's "Mortuary Fund" during 1939, losses or claims were accrued at the beginning and end of the year. The taxpayer's books and records in other respects conform to the cash basis of accounting. Upon examining the taxpayer's income tax return for the year 1939, showing

no tax liability, the Commissioner held that its contention that it should be classified as a life insurance company under the provisions of Section 201 of the Internal Revenue Code was denied and that it was a mutual insurance company under Section 207 thereof. He then determined an adjusted net income of \$6,883.83 as disclosed by the taxpayer's books. The adjustments were made with the following explanations (R. 62-64):

Items deducted in computing net income shown in your audit report not deductible for income tax purposes:

(a) Compensation under M. C. Reese Contract	\$3,675.41
(b) Amount deposited with State Treasurer	4,518.71
(c) Accrued losses (Claims) December 31, 1939	47.34
	<hr/>
	\$8,241.46
(d) Less: Accrued losses (Claims) December 31, 1938 overstated in your audit report	3,323.00
	<hr/>
Difference as shown above....	\$4,918.46

(a) Compensation under M. C. Reese Contract—
\$3,675.41

The amount claimed as a deduction in your audit report as compensation due M. C. Reese under an alleged employment contract amounts to \$18,075.41. The amount actually paid Mr. Reese during the year under said alleged contract amounted to \$14,400.00; the difference, \$3,675.41, is disallowed for the reason that your books and records are on the cash basis of accounting.

(b) Amount deposited with State Treasurer—
\$4,518.71

The amount, \$4,518.71, deposited with the Arizona State Treasurer during the taxable year does

not constitute additions required by law to be made within the taxable year to reserve funds within the meaning of section 207 of the Internal Revenue Code and therefore is not a proper deduction in computing your taxable net income under that section of the Act.

(c) Accrued losses (claims) at December 31, 1939—\$47.34

The amount of accrued losses (claims) at December 31, 1939 shown in your audit report at \$4,299.99 has been reduced to \$4,252.65. The balance, \$47.34, has not been substantiated as proven claims.

(d) Accrued losses (claims) at December 31, 1938—\$3,323.00

The amount of accrued losses (claims) at the beginning of the taxable year 1939, shown in your audit report at \$5,155.49, has been reduced to \$1,832.49, the amount reflected in the computation of your taxable net income for the preceding taxable year 1938 as accrued losses (claims) at the close of that year.

The Tax Court sustained the Commissioner's deficiency determination in its entirety. (R. 76.)

SUMMARY OF ARGUMENT

I

(a) This court has already twice held, with respect to the earlier tax years of 1936-1937 and 1938, that the instant taxpayer is not a life insurance company within statutory provisions identical with Section 201(a) of the Internal Revenue Code. *First Nat. Ben. Soc. v. Stuart*, 134 F. 2d 438, certiorari denied, 320 U. S. 211; *First Nat. Ben. Soc. v. Stuart*, 152 F. 2d 298, certiorari denied, 328 U. S. 847. Although a different tax year is here involved, the facts do not materially differ and the questions of law are substantially the same as those in-

volved in the earlier cases. The principle of *stare decisis* would appear to be determinative of the instant case. Moreover, the recent decision of this Court in *Commissioner v. National Reserve Ins. Co.*, 160 F. 2d 956, with respect to a taxpayer operating under the same state statute as that under which the instant taxpayer operates, holding taxpayer there not to be a life insurance company within the meaning of Section 201(a), likewise may be regarded as controlling here.

(b) Taxpayer did not sustain the burden of proof that more than 50 percent of its reserve funds were held for fulfillment of its life and other contracts, within the meaning of Section 201 (a) of the Internal Revenue Code. Classifying income is not maintaining a reserve, and taxpayer here maintained only one bank account into which receipts from all sources were deposited and from which all disbursements were made. No segregation or allocation was made of receipts except a nominal one on taxpayer's books. Taxpayer made no attempt to separate its various expense and reserve funds. No evaluation was made of individual policies from which a correct legal reserve might have been established.

Moreover, taxpayer's purported reserve, even if it had actually been set up, would not have met the statutory criteria, for under taxpayer's by-laws and in practice, it was subject to invasion and depletion for general expenses and was not set apart exclusively and solely to fulfill its insurance contracts. The Tax Court properly might take into consideration the further circumstance that taxpayer was not formed or operated under the terms of the Arizona statute, which provided for the creation, operation and regulation of life insurance companies.

(c) Taxpayer's so-called "reserve" held by the State Treasurer of Arizona also is not such a reserve fund as is

contemplated by the statute, since it may be invaded and completely wiped out at any time for purposes other than fulfilling its contractual obligations referred to in Section 201 (a) of the Code.

(d) The relevant Treasury Regulations are long standing and have the force of law, and exclude as such reserves as are required to be maintained under the statute, funds to provide for the ordinary running expenses of a business, i.e., solvency reserves. These Regulations are valid, clear, based upon language contained in an opinion of the Supreme Court, and have already obtained express approval of this Court. Thus, they constitute additional ground for sustaining the decision below. However, since taxpayer has not proved the existence of any reserve fund at all, under the language of the statute, strictly without taking into consideration the Regulations, the decision below was correct.

II

The payments made by taxpayer within the taxable year to the Arizona State Treasurer did not constitute a net addition required by law to be made within the taxable year to the reserve funds within the meaning of Section 207 (c) (1) (A), and hence the Tax Court properly denied their deduction, even though taxpayer was, as the Commissioner held, a mutual insurance company other than life, within the meaning of Section 207 of the Internal Revenue Code. The Tax Court was clearly correct in its finding on the record that taxpayer has failed to establish that it was an assessment company and functioning as such during the taxable year. Moreover, an even more serious defect in taxpayer's contention is found in the additional circumstance that whether or not the deposit with the State Treasurer was made by taxpayer as an assessment company, in any

event it was not an addition to "reserve funds", since the deposit with the State Treasurer was subject to depletion for payment of any judgment and interest earned on the deposit might be used for general operating expenses. Thus, the deposit with the state was not exclusively for the fulfillment of insurance contracts.

III

Taxpayer adduced no evidence whatsoever that any premium deposits were required to be made by its members to provide for losses and expenses or that any amount of premium deposits was retained for the payment of losses, expenses and reinsurance reserves whatever, and hence, taxpayer was not entitled to a deduction under the provisions of Section 207 (c) (3) of the Code.

IV

Taxpayer, on the cash basis, was not entitled to deduct the accrued, but unpaid portion of its president's salary, since it showed no reason or basis whatever to support accrual of this single deduction item in order correctly to reflect net income. Moreover, taxpayer failed to comply with long standing Regulations providing that a cash basis taxpayer wishing to take a deduction for a period other than that in which the deduction was paid, must file his return taking the deduction only for the period when paid and attach thereto a statement requesting the Commissioner to allocate it to a different period and setting forth the facts upon which taxpayer bases its claim for such allocation. The failure of taxpayer to comply with the Regulations leaves it without any standing to make any contention in this connection.

ARGUMENT

I

Taxpayer Was Not a Life Insurance Company in the Taxable Year Within the Meaning of Section 201 (a) of the Internal Revenue Code

A

In its brief taxpayer asserts (p. 4) :

The primary issue is, as stated in the memorandum of the Tax Court, whether the petitioner, during the year 1939, was a life insurance company within the provisions of Section 201 of the Internal Revenue Code or was a mutual insurance company other than life within the meaning of Section 207 thereof.

However, this Court has already twice held with respect to earlier tax years that the instant taxpayer is not a life insurance company within statutory provisions identical with Section 201 of the Internal Revenue Code (Appendix, *infra*), and the relevant facts under the instant record do not in any material respect differ from those of the earlier tax years here involved. Moreover, in both earlier cases the Supreme Court denied certiorari upon this taxpayer's application.

Thus, in *First Nat. Ben. Soc. v. Stuart*, decided on March 8, 1943, opinion reported as modified on denial of rehearing April 12, 1943, 134 F. 2d 438, certiorari denied, 320 U. S. 211, where the years 1936 and 1937 were involved, this Court held, affirming the District Court for the District of Arizona,¹ that the only possible finding under the evidence there (p. 440) was that the Society did not maintain any reserve for fulfillment of insurance contracts of the kind required in order to

¹ The opinion of the District Court not officially reported may be found in 30 A.F.T.R. 1659.

qualify as a life insurance company under Section 201 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648. As will be pointed out, *infra*, the evidence here does not materially differ and for the same reasons sustains the identical finding of the Tax Court. (R. 67-68.)

Again, the same result was reached in *First Nat. Ben. Soc. v. Stuart*, with respect to the instant taxpayer for the year 1938, construing Section 201 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 447, where this Court once more affirmed the District Court for the District of Arizona,² and for the same reasons, in its decision entered on December 11, 1945, rehearing denied January 11, 1946, 152 F. 2d 298, certiorari denied, 328 U. S. 847.

Although a different tax year is here involved from the two earlier cases, the facts do not substantially differ³ and the questions of law are the same as those involved in the earlier cases—the identical statutory language, the same questions of application with respect to the same taxpayer—and the principle of *stare decisis* would appear determinative of the instant case.

Res judicata was apparently not asserted on behalf of the Commissioner below, and since a different tax year is involved and the facts, even though similar, are not strictly the same as those of the earlier year, the principle of *res judicata* may technically not be applicable. However, under the instant circumstances, what the Court of Appeals for the Sixth Circuit held in *Grand Rapids & I. R. Co. v. Blanchard*, 38 F. 2d

² The opinion of the District Court not officially reported may be found in 33 A.F.T.R. 1643.

³ Thus, the provisions of taxpayer's certificate of incorporation and bylaws quoted here by the Tax Court (R. 56-59) are identical with those construed in the earlier cases. See Transcript of Record on Appeal in 1943 case, No. 10,231, pp. 59, 68-69, 99-100; reprinted also as part of the record in the 1945 appeal, Transcript of Record in case No. 11,039, pp. 47, 117, 126-127, 160-161.

470, 471, with respect to the principle of *stare decisis* is surely here entirely in point:

Certainly *United States v. Grand Rapids & I. R. Co., supra*, is not *res judicata* of the present controversy, for parties and complete states of fact differ, *but, considering and deciding, as it does, certain contentions, identical in facts, law and application, with those in similar sequential position in this case, it should be followed in the present case on the principle of stare decisis.* * * * (Italics supplied.)

It is our position that the nature of taxpayer's business and of its so-called reserves was not changed in 1939 from what it was in the years 1936 to 1938, inclusive, and that this Court's reasons for holding in the prior cases that taxpayer was not a life insurance company within the meaning of the statute are fully applicable here.

Moreover, even more recently, in *Commissioner v. National Reserve Ins. Co.*, decided April 3, 1947, 160 F. 2d 956, this Court, ruling with respect to a taxpayer, which like the instant taxpayer, operated under the Arizona Benefit Corporation Law of 1937 (4 Arizona Code Annotated (1939), c. 53, Art. 6, Sec. 53-601 (Appendix, *infra*)), held that taxpayer in the cited case, for reasons closely similar to those stated by the Tax Court below, with respect to taxpayer here, did not satisfy the definition of "reserve funds" of life insurance companies set forth in the controlling Section 201 (a) of the Internal Revenue Code. The *National Reserve Ins. Co.* case was cited and followed by the Tax Court below (R. 69, 73), and may also be regarded as controlling here.

B

The Internal Revenue Code contains special provisions dealing with insurance companies which are di-

vided for tax purposes into life insurance companies (Section 201), insurance companies other than life or mutual (Section 204), and mutual insurance companies other than life (Section 207, Appendix, *infra*). The Commissioner denied taxpayer's contention that for the taxable year 1939 it should be classified as a life insurance company under the provisions of Section 201 of the Internal Revenue Code, and held that it was a mutual insurance company under Section 207. (R. 14, 62.) As already noted in the Statement, *supra*, the Tax Court sustained the Commissioner's determination on review. One advantage of classification as a life insurance company is that premium receipts are excluded from gross income. Under Section 202 (a) of the Code, the gross income of a life insurance company consists only of income received from interest, dividends and rent, whereas there is no similar limitation with respect to gross income of a mutual insurance company other than life, under Section 207.

Commencing with the Revenue Act of 1921, companies which met the statutory definition of life insurance companies have thus not been required to include premiums in gross income. (R. 65-67.) See *Helvering v. Oregon Ins. Co.*, 311 U. S. 267. The statutory definition of "life insurance company" contained in Section 201 (a) of the Code, here controlling, reads as follows:

(a) *Definition*.—When used in this chapter the term "life insurance company" means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds.

As this Court held in both the *First Nat. Ben. Soc.* cases, *supra*, under this statutory language, it is not

enough that life insurance contracts are issued, but in addition, the provision with respect to “reserve funds * * * for the fulfillment of such contracts” must be met.

It is well settled that the term “reserve funds” as used in the revenue statutes in connection with life insurance companies, refers to life insurance reserves, in contrast to solvency or ordinary business liability reserves. Thus, as the Supreme Court stated in *Helvering v. Inter-Mountain Life Ins. Co.*, 294 U. S. 686, 690:

The word “reserve” has many meanings. Accounts creating reserves are set up in almost every line of business, and funds evidenced by the book entries are held for many and widely different purposes. As the Act does not permit corporations other than insurance companies to make deductions of the kind here under consideration, “reserve funds” may not reasonably be deemed to include values that do not directly pertain to insurance. In life insurance the reserve means the amount, accumulated by the company out of premium payments, which is attributable to and represents the value of the life insurance elements of the policy contracts.

Commissioner v. Monarch Life Ins. Co., 114 F. 2d 314, 318, 323 (C. A. 1st).

On this issue which the Tax Court regarded as “factual” (R. 68), as to whether or not more than 50 percent of taxpayer’s reserve funds were held for fulfillment of its life and other contracts, within the purview of the statute, taxpayer had the burden of proof. *First Nat. Ben. Soc. v. Stuart*, *supra*, 152 F. 2d 298, 299. This burden the Tax Court properly here held that taxpayer not only failed to sustain but that, in fact, the weight of the evidence was strongly against it. (R. 68.)

The ruling of this Court in *First Nat. Ben. Soc. v. Stuart, supra*, 134 F. 2d 440, with respect to taxpayer's alleged "reserve" for the years 1936 and 1937 is completely applicable to the record at bar for the taxable year 1939, as follows:

Appellant contends that the finding of the court below, that it maintained no reserve for the fulfillment of insurance contracts, is not sustained by the evidence. We think the finding is the only one possible under the evidence. The evidence goes no further than to show that appellant classified its income, but *classifying income is not maintaining a reserve*. (Italics supplied.)

Similarly here the trier of the facts found that taxpayer maintained only one bank account, into which receipts from all sources were deposited and from which all disbursements were made. No segregation or allocation was made of receipts except a nominal one on taxpayer's books. Taxpayer made no attempt to separate its various expense and reserve funds. No evaluation was made of individual policies from which a correct legal reserve might have been established. (R. 61, 68.) The statute contemplates in effect a trust fund for policyholders. Here taxpayer did not have or maintain such a fund in fact. It was not invested, it was not interest bearing, it was not set aside, reserved, segregated or earmarked in any way for the holders of certificates. Even if *arguendo*, as stated in the case of *General Life Ins. Co. v. Commissioner*, 137 F. 2d 185 (C. A. 5th), (but which we dispute), the Commissioner is not concerned with the adequacy of a reserve, accepted as adequate by state authorities, he is (as there held, pp. 189-190) concerned with its "inviolability", and the tax law requires that a reserve equal to 50 percent of the total reserves be maintained "for the sole and exclusive protection" of policyholders and "ir-

revocably” dedicated to the payment of claims. Merely calling an item in a ledger account a reserve fund affords no protection whatever for policyholders, and a fund which can be invaded for the payment of general expenses, as well as for insurance claims, is certainly not “irrevocably” dedicated for their use to any extent.

Accordingly, here, as in the earlier *First Nat. Ben. Soc.* case, from which quotation is made immediately above, in the first place, the only possible finding under the evidence is that taxpayer maintained no reserve for the fulfillment of insurance contracts. Classifying income is not maintaining a reserve within the meaning of Section 201(a).

Moreover, in the second place, the purported reserve, even if it had actually been set up, would not have met the criteria for a reserve fund contemplated by the statutory definition, for under the taxpayer’s by-laws and in practice it was subject to invasion and depletion for general expenses and was not set apart exclusively and solely to fulfil its insurance contracts. Thus, the by-laws provided for payment of the reserve fund for “taxes and other necessary expenses incurred in the administration and defense of said fund”. (Section II, R. 58, Section IV, R. 58-59.)

Further, in practice taxpayer made no attempt to separate its various expense and reserve funds. It relied on its current premium receipts to pay its current expenditures including claims. (R. 68.) In *Commissioner v. National Reserve Ins. Co., supra*, this Court said, with respect to an analogous situation, as follows (p. 960):

The Company contends that since in neither tax years was its reserve for the “fulfillment” of its policy claims an amount less than the 50 percent of its total reserve fund, it has complied with Section

201 (a) of the Code. We do not agree. The fund was held for these five other purposes and hence not for the exclusive purpose of the fulfillment of the obligations of the policies. It is immaterial that possible drains on the reserve did not happen so to reduce it below its minimum in these particular years.

Thirdly, it is significant that taxpayer was organized originally in 1934 (R. 29) under the Revised Code of Arizona (1928), Sections 607-610, inclusive (Appendix, *infra*) (R. 56, 70), providing for "benefit societies" and "shall not be subject to the provisions of the general insurance laws" (Section 610). During the taxable year it operated as an "existing corporation or association" under the Benefit Corporation Law of 1937, subsequently codified in the Arizona Code of 1939, Section 53-616 (Appendix, *infra*), and similarly "shall not be subject to the provisions of the general insurance laws" (Section 53-615, Appendix, *infra*). On the other hand, the creation, operation and regulation of life insurance companies was covered in Chapter 61 of the Arizona Code of 1939. The Tax Court correctly held this circumstance significant in evaluating taxpayer's attempt to secure the benefit of federal tax exemption as a life insurance company. (R. 70.)

C

Section 53-605 of the Arizona Code (Appendix, *infra*), provides that a benefit corporation shall deposit with the State Treasurer of Arizona \$1,000 before receiving its certificate, \$1,000 in monthly payments, and shall make further deposits of \$1 for each \$1,000 of protection until a total of \$10,000 shall have been so deposited. However, the deposits so made are subject to a lien for any unsettled final judgment of a court of

Arizona (Section 53-605 (d)) and any interest earned on the deposit or other corporate assets may be used for general operating expenses (Section 53-605 (c) and 53-609 (b)). (Appendix, *infra*.) Hence, contrary to taxpayer's contention (Br. 13-14), it is obvious that the taxpayer's so-called "reserve" held by the State Treasurer of Arizona also is not a "reserve fund" contemplated by the statute, since it may be invaded and completely wiped out at any time for purposes other than fulfilling its contractual obligations referred to in Section 201 (a) of the Code. Indeed, in the *National Reserve Ins. Co.* case, *supra*, this Court has already so ruled with respect to such a so-called "reserve" set up by the identical sections of the Arizona Code. (Pp. 958-960.)

D

Consequently, on the face of the statute alone, without taking into consideration the Treasury Regulations at all, taxpayer has failed to comply with the provisions of Section 201 (a) with regard to maintenance of reserve funds held for the fulfillment of its life and insurance contracts.

Moreover, the relevant Treasury Regulations construing Section 201 add further support to the holding below. Treasury Regulations 103, Sections 19.201 (a)-1 and 19.203 (a)(2)-1 (Appendix, *infra*), are identical with Treasury Regulations 94, under the Revenue Act of 1936, Articles 201 (a)-1 and 203 (a)(2)-1, expressly approved by this Court in *First Nat. Soc. Ben.*, *supra*, 134 F. 2d 438, 439-440.⁴ As this Court there held

⁴ Successive Regulations since 1921 have been substantially similar. See Articles 661 and 681, Treasury Regulations 62, 65 and 69; Articles 951 and 971, Treasury Regulations 74 and 77; Articles 201 (a)-1 and 203 (a)(2)-1, Treasury Regulations 86 and 101, under the Revenue Acts of 1921, 1924, 1926, 1928, 1932, 1934 and 1938.

(p. 440) :

Under these circumstances “Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.” *Helvering v. Reynolds Co.*, 306 U. S. 110, 115, 59 S. Ct. 423, 426, 83 L. Ed. 536. See, also, *Helvering v. Winmill*, 305 U. S. 79, 83, 59 S. Ct. 45, 83 L. Ed. 52, and cases cited in note 7.

Indeed, far from disapproving the Regulations, Congress has adopted them. In Section 163 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, it amended Section 201 of the Internal Revenue Code to provide a definition of the term “life insurance reserves” (as H. Rep. No. 2333, 77th Cong., 2d Sess., p. 109 (1942-2 Cum. Bull. 372), states) as—

substantially that contained for many years in the regulations with the addition that the reserves must be based on recognized experience tables.

The classic definition of a reserve fund contained in Section 19.203 (a) (2)-1 of the relevant Treasury Regulations 103, as—

a sum of money, variously computed or estimated, which, with accretions from interest, is set aside (reserved) as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims

was taken from *Maryland Casualty Co. v. United States*, 251 U. S. 343, 350, as noted by this Court in *Commissioner v. National Reserve Ins. Co.*, *supra*, p. 960. Among other things, “for example”, as stated in the Regulations: ⁵

⁵ Significantly, this quoted clause, in addition to the earlier language of Section 19.203 (a) (2)-1 particularly referred to in the *National Reserve Ins. Co.* case, *supra*, is likewise derived from the *Maryland Casualty Co.* case, p. 350. Indeed, in the earlier form of the Regulations, which is substantially identical with the present form, the *Maryland Casualty Co.* case is explicitly quoted. See Article 681 of Regulations 62, *supra*, under the Revenue Act of 1921.

it does not include reserves required to be maintained to provide for the ordinary running expenses of a business definite in amount, and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance, and unpaid brokerage; * * *.

Moreover, not only has this Court explicitly approved the Regulations, but so far as any issue relevant to this case is concerned, no question is raised as to their validity in the cases, decided in other circuits, cited on page 11 of taxpayer's brief. Thus, *General Life Ins. Co. v. Commissioner*, *supra*, threw doubt on the validity of the Regulation's actuarial requirements for a reserve fund, but, as we have already shown, the Court stated that the fund was in the nature of a trust and accordingly the case supports the result of the court below. The companion case, *Abilene Life Ins. Co. v. Commissioner*, 137 F. 2d 191 (C. A. 5th), was decided on the same basis. *Jones v. Oklahoma Ben. Life Ass'n*, 151 F. 2d 505 (C. A. 10th), was expressly limited to the question whether interest which did not accrue to the reserve fund is a use of the fund other than for the payment of claims arising out of the policies, and was in any event expressly distinguished by this Court in the *National Reserve Ins. Co.* case, *supra*, p. 960. *Swift & Company Employees Benefit Ass'n v. Commissioner*, 151 F. 2d 625 (C. A. 7th), turned solely on the requirement of the Regulations that the reserve be required by law.⁶ *American Ins. Co. of Texas v. Thomas*, 146 F. 2d 434 (C. A. 5th), has no materiality to the instant issues at all.

As already noted, since taxpayer has not proved the existence of any reserve fund at all, on the language of the statute alone without taking into consideration the

⁶ In application for certiorari from the decision of this Court, in *First Nat. Ben. Soc.*, 152 F. 2d 298, *supra*, taxpayer asserted an alleged conflict supposed to be posed by these four cases, but, as already noted, the Supreme Court denied certiorari.

Regulations, the decision below was correct. Hence, strictly no question as to the validity of the Regulations is raised here. However, in any event, the Regulations are valid, clear, based upon language contained in the opinion of the Supreme Court in the *Maryland Casualty Co.* case, have already obtained express approval by this Court, and constitute additional ground for sustaining the decision below.

II

The Payments Made by Taxpayer Within the Taxable Year to the Arizona State Treasurer Did Not Constitute a Net Addition Required by Law to Be Made Within the Taxable Year to Reserve Funds Within the Meaning of Section 207 (c)(1)(A) of the Code, and Hence Were Properly Held Not Deductible by the Tax Court

The Commissioner held that taxpayer was a mutual insurance company other than life under Section 207 of the Internal Revenue Code. (R. 14, 62.) Taxpayer argues (Specification of Errors, III, Br. 6, 15-16), that if it is to be so classified under Section 207, it is entitled to a deduction by reason of certain sums paid to the Arizona State Treasurer as a net addition required by law to be made within the taxable year to reserve funds, within the meaning of Section 207 (c)(1)(A) (Appendix, *infra*). During the taxable year taxpayer deposited with the Arizona State Treasurer \$4,518.71. (R. 72.) See Code of Arizona, Section 53-605.

In this connection taxpayer argues that it is an "assessment" insurance company (Br. 15) within the meaning of Section 202 (b) of the Internal Revenue Code (Appendix, *infra*), and that the above mentioned sum paid to the State Treasurer constitutes a deposit pursuant to law as additions to reserve funds, deductible under the terms of Section 207 (c)(1)(A).

In the first place, however, the Tax Court was clearly correct in its finding that taxpayer has failed to establish that it was an assessment company and function-

ing as such during the taxable year. (R. 74.) Thus, in all its years of operation taxpayer never levied any assessments against its members or policyholders. (R. 62.) Again, during 1939 it had in force only 34 out of 10,900 outstanding "policies" or .32 plus percent, even labeled "Assessment Forms". (R. 60, 74.) Except for these 34, the remainder of its policies were not subject to assessment, as shown by the facts that the payments were called premiums, the contracts, certificates or policies, and their holders denominated members or policyholders. The Tax Court further observed that even as to the so-called "Assessment Forms", of which only 34 were issued, none, as a matter of fact, was presented in evidence, and their true character could not be determined merely from the name given by taxpayer. (R. 74.)

Furthermore, an even more serious defect in taxpayer's contention is found in the additional circumstance that whether or not the deposit with the State Treasurer was made by taxpayer as an assessment company, within the meaning of the parenthetical clause of Section 207 (c)(1)(A), in any event it was not an addition to "reserve funds" since, for the reasons already given (see Point I, subdivision C, *supra*), the funds provided by Section 52-605 of the Arizona Code are not reserve funds within the meaning of the controlling sections of the Internal Revenue Code. Construing this section, the controlling Treasury Regulations 103, Section 19.207-4 (Appendix, *infra*), provided that the reserve funds defined in Section 207 (c)(1)(A)—

do not include assets required to be held for the ordinary running expenses of the business, such as taxes, salaries, reinsurance, and unpaid brokerage. Only reserves commonly recognized as reserve funds in insurance accounting are to be taken into

consideration in computing the net addition to reserve funds required by law.

The same Treasury Regulations (Section 19.207-4) further refer to Section 19.203 (a)(2)-1, "for a general definition of 'reserve fund' " discussed, *supra*, in Point I, subdivision D. Accordingly, since the deposit required by the Arizona statute was not made to a "reserve fund", the deduction was properly not allowed. *Commissioner v. National Reserve Ins. Co.*, *supra*, pp. 958-960.

III

Taxpayer Failed to Establish That It Was Entitled to Additional Deduction under Section 207 (c) (3)

The Tax Court held that taxpayer had failed to present any evidence proving its claim to certain other deductions under Section 207 (c) (3) (Appendix, *infra*), and therefore was considered to have abandoned the issue relating to them (R. 75). Nevertheless, taxpayer asserts such a contention in its brief here. (Pp. 17-18.) The holding of this Court in *First Nat. Ben. Soc. v. Stuart*, p. 299, with respect to a like contention by this taxpayer there is here fully applicable, as follows:

Appellant alleged, in substance and effect, that, if taxable under § 207 (a), it was entitled to a deduction under § 207 (c) (3) of the Revenue Act of 1938, 26 U. S. C. A. Int. Rev. Acts, pp. 1092, 1093. Appellee denied that appellant was entitled to any such deduction. On this issue, appellant had the burden of proof. Thus appellant had the burden of proving that its members were required to make premium deposits to provide for losses and expenses, and that some amount thereof was returned to its policyholders or was retained for the payment of losses, expenses, and reinsurance reserves. The burden was not sustained. The court properly

concluded that appellant was not entitled to a deduction under § 207 (c) (3).

There is no evidence whatsoever in the instant record that any premium deposits whatever were made by taxpayer's members to provide for losses and expenses, nor any evidence that any amount of premium deposits were returned to policy holders or "retained for the payment of losses, expenses, and reinsurance reserves." Section 207 (c) (3). Not only is there a complete absence of proof on this point, further, Treasury Regulations 103, Sec. 19.207-6 (Appendix, *infra*), provides—

The amount of premium deposits retained for the payment of expenses and losses, and the amount of such expenses and losses, may not both be deducted.

Here taxpayer has never alleged or proved any losses or expenses for which it was not granted deduction and for which premium deposits were retained. Deductions are of course allowed only when plainly authorized by the revenue statutes and the taxpayer is subject to a strict burden of proof to establish them. *Helvering v. Inter-Mountain Life Ins. Co.*, 294 U. S. 686, 689. As aforesaid, taxpayer here completely failed to sustain this burden.

IV

Taxpayer, Being on the Cash Basis, Is Not Entitled to Deduct the Accrued, But Unpaid, Portion of Its President's Salary

Taxpayer admits that its income tax return was filed on the cash basis. (Br. 19.) It argues here as it did below, that since the Commissioner accrued its unpaid claims, which were reported at the close of the year and upon which no proof of claim had been made, he should have accrued also the unpaid portion of its president's compensation or "salary" and permitted taxpayer to deduct this unpaid amount in the sum of \$3,675.41.

(R. 74.) Taxpayer's books and records were maintained on the cash basis. (R. 62.)

Taxpayer does not here (Br. 17), and did not below challenge the action of the Commissioner in accruing its unpaid claims (R. 74-75). The Commissioner, as the Tax Court held, deemed such treatment of the unpaid claims was requisite correctly to reflect taxpayer's true income. (R. 74-75.) The statute expressly affords the Commissioner discretion to make such a change. Thus, Section 41 (Appendix, *infra*), provides that if the method of accounting regularly employed in keeping the books of taxpayer—

does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income.

Long standing Treasury Regulations further confirm the Commissioner's discretion in this respect. Regulations 103, Sections 19.41-1 and 19.41-2. (Appendix, *infra*).

In any event, as already noted, taxpayer does not contest the correction thus made by the Commissioner to reflect taxpayer's true income. Its sole contention is that as to one particular item of expense on its return out of many others there is to be a deviation from the cash basis. In other words, since the Commissioner made one deviation, taxpayer is entitled to another deviation, namely, the deduction in the taxable year of salary unpaid to its president. Thus, while, on the one hand, it does not dispute the correctness of the treatment of the unpaid claims required by the Commissioner in order fairly to reflect its income, on the other hand, it shows no reason or basis whatsoever, to support accrual of this single deduction item, in order correctly to reflect net income.

Moreover, taxpayer's claim on well settled grounds must fail for an additional reason. Thus Section 43 (corresponding to Section 41, dealing with income items) with respect to deductions, provides:

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

Construing this statutory provision, long standing Treasury Regulations prescribe (Sec. 19.43-1):

If a taxpayer desires to claim a deduction or a credit as of a period other than the period in which it was "paid or accrued" or "paid or incurred," *he shall attach to his return a statement setting forth his request for consideration of the case by the Commissioner together with a complete statement of the facts upon which he relies.* However, in his income tax return he shall take the deduction or credit only for the taxable period in which it was actually "paid or incurred," or "paid or accrued," as the case may be. Upon the audit of the return, the Commissioner will decide whether the case is within the exception provided by the Internal Revenue Code, and the taxpayer will be advised as to the period for which the deduction or credit is properly allowable. (Italics supplied.)

Applying the cognate of the quoted sections of the Code and of the Regulations, the Court of Appeals

for the Third Circuit in *Cassatt v. Commissioner*, 137 F. 2d 745, 749, ruled:

The taxpayer, * * * urges that the Commissioner should have permitted the amortization of the sums here in question * * * under the authority given him by Section 43 of the Revenue Act of 1934, 26 U. S. C. A. Int. Rev. Code, § 43, in order more clearly to reflect the income of Cassatt and Company. But it appears that the taxpayer did not comply with Article 43-1 of Regulations 86 which implements Section 43 by providing that a taxpayer wishing to take a deduction for a period other than that in which it was paid or accrued shall file his return taking the deduction only for the period when paid or accrued and attach thereto a statement requesting the Commissioner to allocate it to a different period and setting forth the facts upon which he bases his claim for such allocation. This regulation is reasonable and within the Commissioner's authority. *Helvering v. Cannon Valley Milling Co.*, 8 Cir., 1942, 129 F. 2d 642. The failure of the taxpayer to comply with it leaves him without standing to invoke the provisions of Section 43.

Following the cited case is the holding of the Tax Court in *Your Health Club, Inc. v. Commissioner*, 4 T. C. 385, 389.

Similarly, here there is no showing whatsoever that taxpayer returned the asserted deduction on the cash basis and attached thereto a statement requesting the Commissioner to allocate it to a different period and setting forth the facts upon which it based its claim for such allocation, as required by the Regulations. Indeed, the evidence is to the contrary (R. 63), for it appears that taxpayer took the deduction in its return without any such explanation, notice, or request to the Commissioner (R. 14-15, 62-63). Hence, on principle, and as held in the cited case, the failure of the

taxpayer to comply with the Regulations leaves it without standing to invoke the provisions of Section 43.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
I. HENRY KUTZ,
*Special Assistants to the
Attorney General.*

APRIL 1950.

APPENDIX

INTERNAL REVENUE CODE:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(26 U. S. C. 1946 ed., Sec. 41.)

SEC. 201. TAX ON LIFE INSURANCE COMPANIES.

(a) *Definition*.—When used in this chapter the term “life insurance company” means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds.

* * * * *

(26 U. S. C. 1946 ed., Sec. 201.)

SEC. 202. GROSS INCOME OF LIFE INSURANCE COMPANIES.

* * * * *

(b) *Reserve Funds Required by Law, Defined*.—The term “reserve funds required by law” includes, in the case of assessment insurance, sums actually deposited by any company or association with State or Territorial officers pursuant to law as guaranty or reserve funds, and any funds main-

tained under the charter or articles of incorporation of the company or association exclusively for the payment of claims arising under certificates of membership or policies issued upon the assessment plan and not subject to any other use.

(26 U. S. C. 1946 ed., Sec. 202.)

SEC. 203. NET INCOME OF LIFE INSURANCE COMPANIES.

(a) *General Rule.*—In the case of a life insurance company the term “net income” means the gross income less—

* * * * *

(2) *Reserve funds.*—An amount equal to 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year, except that in the case of any such reserve fund which is computed at a lower interest assumption rate, the rate of $3\frac{3}{4}$ per centum shall be substituted for 4 per centum. Life insurance companies issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan, continuing for life and not subject to cancellation, shall be allowed, in addition to the above, a deduction of $3\frac{3}{4}$ per centum of the mean of such reserve funds (not required by law) held at the beginning and end of the taxable year, as the Commissioner finds to be necessary for the protection of the holders of such policies only;

* * * * *

(26 U. S. C. 1946 ed., Sec. 203.)

SEC. 207. MUTUAL INSURANCE COMPANIES OTHER THAN LIFE.

(a) *Imposition of Tax.*—

(1) *In general.*—There shall be levied, collected, and paid for each taxable year upon the

special class net income of every mutual insurance company (other than a life insurance company) a tax equal to 16½ per centum thereof.

* * * * *

(c) *Deductions*.—In addition to the deductions allowed to corporations by Section 23 the following deductions to insurance companies shall also be allowed, unless otherwise allowed—

(1) *Mutual insurance companies other than life insurance*.—In the case of mutual insurance companies other than life insurance companies—

(A) the net addition required by law to be made within the taxable year to reserve funds (including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds) ; and

* * * * *

(3) *Mutual insurance companies other than life and marine*.—In the case of mutual insurance companies (including interinsurers and reciprocal underwriters, but not including mutual life or mutual marine insurance companies) requiring their members to make premium deposits to provide for losses and expenses, the amount of premium deposits returned to their policyholders and the amount of premium deposits retained for the payment of losses, expenses, and reinsurance reserves.

(26 U. S. C. 1946 ed., Sec. 207.)

4 Arizona Code annotated (1939), c. 53, Art. 6:

BENEFIT CORPORATION LAW

53-601. *Short title*.—This act may be cited as the Benefit Corporation Law of 1937. [Laws 1937, ch. 36, § 1, p. 107.]

53-602. *Benefit corporations*.—Corporations, not for pecuniary profit, may be formed to provide

cash benefits for members and cash benefits for the nominees of deceased members, and shall include all corporations, societies and associations operating an insurance business where funds are provided by mutual contributions, periodical payments, dues or assessments, except those hereinafter exempted. [R. S. 1901, § 898; 1913, § 2215; R. C. 1928, § 607; Laws 1937, ch. 36, § 2, p. 107.]

53-603. *Formation*.—(a) Two hundred [200] or more citizens of the United States, residents of this state for at least one [1] year, may form a benefit corporation by filing articles of incorporation, verified by each of them, stating the general objects of the corporation, its principal place of business, the time of its commencement and termination, the names of the directors and officers by whom the affairs of the corporation are to be conducted and the time of their election, the corporation's name (which shall indicate its general character of business and shall not closely resemble the name of any association, life insurance company, or corporation now licensed to do business in this state), and whether private property is to be exempted from liability for the corporate debts.

* * * * *

[R. S. 1901, § 889; 1913, § 2216; R. C. 1928, § 608; Laws 1937, ch. 36, § 3, p. 107.]

53-605. *Deposit of money or security*.—(a) Every benefit corporation organized or operating under the provisions of this act, before receiving a certificate of authority to transact business, shall, in addition to the requirements of section 609b [§ 53-611], deposit with the state treasurer, to be by him held in trust for the benefit and protection of the corporation's members, the sum of one thousand dollars [\$1,000]. Thereafter a further sum of one thousand dollars [\$1,000], divided into twelve [12] equal monthly payments, beginning thirty [30] days after the certificate of authority is issued, shall be likewise deposited with the state

treasurer. Failure to pay any such monthly payment shall automatically cancel the corporation's certificate of authority.

(b) In addition to said deposits every such corporation shall, not later than February 1, 1940, and on or before February 1 of each year thereafter, deposit with the state treasurer, to be by him held in trust as hereinafter provided, for the benefit and protection of the members of the corporation, a further sum equal to one dollar [\$1.00] for each one thousand dollars [\$1,000] of protection in force on December 31 of the preceding year, beginning as of December 31, 1939, until a total of ten thousand dollars [\$10,000] has been so deposited.

(c) The deposits prescribed by this section shall be subject to withdrawal from the state treasury in whole or in part only on the order of and as directed by the corporation commission, but may, with the commission's approval, be invested in United States or state bonds, which shall be placed with and assigned to the state treasurer and held by him as provided for the original deposits. Subject to approval by the commission any such securities may be exchanged for others of like amounts. The interest on said securities shall be payable to the corporation depositing the same.

(d) Any unsettled final judgment of a court of this state shall be a lien on the deposits of money or securities prescribed by section 608b [§ 53-605], and subject to execution after thirty [30] days from entry of final judgment. If said deposit is depleted thereby it shall be replenished within ninety [90] days.

(e) Said deposit may be considered as a part of any required reserve of the corporation and shall not be subject to withdrawal so long as the corporation has any contract or other liability outstanding. If and when the corporation liquidates, dissolves, or merges with another corporation, and there are no certificates or other liabilities not satisfied or as-

sumed, the deposit shall be returned to the corporation upon the order of the commission, and placed to the credit of the fund from which it was taken or paid to the person who may have advanced it. [R. C. 1928, § 608b as added by Laws 1937, ch. 36, § 5, p. 107.]

53-606. *Benefit certificate*.—(a) Every benefit certificate issued by any such corporation shall specify the maximum amount not exceeding five thousand dollars [\$5,000], on the life of any individual, to be paid on the happening of the contingency therein stated, and shall state the basis or amount to be set aside to the mortuary and reserve fund. The certificate, including any written amendment thereto, and, at the option of the corporation, the application therefor, and the by-laws of the corporation, shall constitute the entire contract between the corporation and the member, and the applicant shall see that all facts required to be stated are set forth in the application.

* * * * *

[R. C. 1928, § 608c as added by Laws 1937, ch. 36, § 6, p. 107.]

53-609. *Payments and Funds*.—(a) Every benefit corporation shall provide in its benefit certificate for periodical payments or dues sufficient to pay benefit claims and general operating expenses as stipulated therein.

(b) A mortuary and reserve fund, exclusive of other assets, may be created, out of which may be paid all benefit claims arising under the certificates, the deposits required to be made with the state treasurer as provided by section 608b [§ 53-605], and attorney's fees and necessary expenses arising out of the defense, settlement, or payment of any contested or disputed claim. The residue of payments made by members, after setting aside the amount required for the mortuary and reserve fund, and interest earned by the assets of the corporation, whether deposited with the state treasurer

or otherwise invested, may be used for general operating expenses. [R. S. 1901, § 900; 1913, § 2217; rev., R. C. 1928, § 609; Laws 1937, ch. 36, § 9, p. 107.]

*

*

*

*

*

53-613. *Organizations exempted.*—The provisions of this act shall not apply to secret or fraternal societies, lodges, or councils, which conduct their business and secure members on the lodge system exclusively, and having a ritualistic work and ceremonies in their societies, lodges, or councils, nor to any mutual or benefit association organized or formed and composed exclusively of members of any such society, lodge, or council, church or religious society, nor to any association of employees employed by one and the same concern, or its subsidiary [subsidiary], nor any labor organization, nor to any life insurance company organized or operating under chapter 36, Revised Code of 1928, nor to any foreign assessment company operating under the general insurance laws of this state. [R. C. 1928, § 609d as added by Laws 1937, ch. 36, § 13, p. 107.]

*

*

*

*

*

53-615. *Powers of benefit corporations.*—Any corporation organized under the provisions of this act may contract, sue and be sued by and in its own name, and shall not be subject to the provisions of the general insurance laws, and no law hereafter enacted shall apply to such corporations unless they are expressly designated therein. * * * The by-laws or the benefit certificate may provide for the qualification of members, mode of acceptance, the fees of admission and periodical payments or dues, the expulsion of members for non-payment of any periodical payments or dues, the restoration to membership, the employment and compensation of its agents and other regulations not in violation of this act. [R.S. 1901, §§ 901, 902; 1913, §§ 2218, 2219; cons., R. C. 1928, § 610; Laws 1937, ch. 36, § 15, p. 107.]

53-616. *Existing corporations.*—Any existing corporation or association heretofore incorporated under the provisions of sections 607, 608, 609 and 610, article 3, chapter 14, Revised Code of 1928 [§§ 53-602, 53-603, 53-609, 53-615], shall be deemed to be lawfully incorporated, organized and existing and may continue its corporate existence and transact business under, and avail itself of the provisions hereof without reincorporating or requalifying, except that such corporation shall on or before January 1, 1938, comply with the provisions hereof as to statutory agent, minimum membership, deposits of money or securities, benefit certificate, fidelity bond, and certificate of authority, and shall be subject to examination as herein provided. [R. C. 1928, § 610a as added by Laws 1937, ch. 36, § 16, p. 107.]

Revised Code of Arizona (1928), c. 14, Art. 3:

[607. *Benefit Societies; limitations.* Associations may be formed for the purpose of paying to the nominee of any member a sum upon the death of said member not exceeding three dollars for each member of such association. No such association shall exceed in number five thousand persons. (§ 898, R. S. '01; 2215, R. S. '13.)

§ 608. *Formation.* Such association shall be formed by filing a verified certificate in the office of the recorder of the county in which the principal place of business is to be situated, and filing a like certificate in the office of the corporation commission; such certificate shall state the general objects of the association, its principal place of business and the names of the officers selected to hold for the first three months, and shall be signed by the said officers and verified by at least three of them. (§ 889, R. S. '01; 2216, R. S. '13.)

§ 609. *Assessments.* Said association, upon the death of any member, may levy an assessment, not exceeding three dollars, upon each living member, and collect and pay the same to the nominee of such deceased, and may also provide for annual assess-

ments of members, such annual assessments upon any one member not to be raised above that established at the time such member joined the association. (§ 900, R. S. '01; 2217, R. S. '13, rev.)

§ 610. *Powers; not controlled by insurance laws.* Such association may sue and be sued by its name, may loan its funds and own sufficient real property for its business purposes, and such other real property as it may purchase on foreclosure of its mortgages. Such property so obtained through foreclosure shall be sold and conveyed within five years from the day title is obtained, unless the superior court of the proper county shall, upon petition and good cause shown, extend the time. Such association may make such by-laws as may be necessary for its government and for the transaction of its business, and shall not be subject to the provisions of the general insurance laws. (§§ 901-2, R. S. '01; 2218-19, R. S. '13, cons.)

Treasury Regulation 103, promulgated under the Internal Revenue Code:

Sec. 19.41-1. *Computation of net income.*—Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 19.42-1 to 19.42-3, inclusive.)

If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

Sec. 19.41-2. *Bases of computation and changes in accounting methods.*— * * * All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. But see sections 42 and 43. See also section 48.

* * * * *

Sec. 19.201(a)-1. *Life insurance companies: Definition.*—The term “life insurance company” as used in chapter 1 is defined in section 201(a). In determining whether an insurance company is a “life insurance company” as defined in section 201(a), no reserve shall be regarded as held for the fulfillment of an insurance contract unless it conforms to the definition of “reserve” contained in section 19.203(a)(2)-1.

Sec. 19.203(a)(2)-1. *Reserve funds.*—In general, the reserve contemplated is a sum of money, variously computed or estimated, which, with accretions from interest, is set aside (reserved) as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims. It must be required either by express statutory provisions or by rules and regulations of the insurance department of a State, Territory, or the District of Columbia when promulgated in the exercise of a power conferred by statute, but such requirement, without more, is not conclusive; for example, it does not include reserves required to be maintained to provide for the ordinary running expenses of a business definite in amount, and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries,

reinsurance and unpaid brokerage; the reserve or net value of risks reinsured in other solvent companies to the extent of the reinsurance; reserve for premiums paid in advance; annual and deferred dividends; accrued but unsettled policy claims; losses incurred but unreported; liability on supplementary contracts not involving life contingencies; estimated value of future premiums which have been waived on policies after proof of total and permanent disability.

In any case where reserves are claimed, sufficient information must be filed with the return to enable the Commissioner to determine the validity of the claim. Reference should be made to the item in which the reserve appears in the annual statement and to the statute or insurance department ruling requiring that such reserves be held. Only reserves which are so required, which are peculiar to insurance companies, and which are dependent upon interest earnings for their maintenance will be considered. A company is permitted to make use of the highest aggregate reserve called for by any State or Territory or the District of Columbia in which it transacts business, but the reserve must have been actually held.

In the case of life insurance companies issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan, continuing for life and not subject to cancellation, it is required that reserve funds thereon be based upon recognized tables of experience covering disability benefits of the kind contained in policies issued by this particular class of companies. The deduction in respect of such reserve funds (not required by law) is $3\frac{3}{4}$ percent of the mean of such reserve funds held at the beginning and end of the taxable year.

Sec. 19.207-2. *Gross income of mutual insurance companies other than life.*—The gross income of mutual insurance companies (other than life) consists of their total revenue from the operation of the business and of their income from all other

sources within the taxable year, except as otherwise provided by the Internal Revenue Code. Gross income includes net premiums (that is, gross premiums less returned premiums on policies canceled and premiums on policies not taken), investment income, profits from the sale of assets, and all gains, profits, and income reported to the State insurance departments, except income specifically exempt from tax. * * * A net decrease in reserve funds required by law within the taxable year must be included in the gross income to the extent that such funds are released to the general uses of the company and increase its free assets. Any net decrease in reserves shall be added to the gross income, unless the company shall show that such decrease resulted from the application of reserves to the purposes for which they were established.

Sec. 19.207-3. *Deductions allowed mutual insurance companies other than life insurance companies.*—Mutual insurance companies (other than life insurance companies) are entitled to the same deductions from gross income as other corporations, and also to the deduction of the net addition required by law to be made within the taxable year to reserve funds and of the sums other than dividends paid within the taxable year on policy and annuity contracts. Mutual insurance companies are not entitled to the deductions allowed by section 204 (c), but (except in the case of life insurance companies) are entitled to the deductions allowed by section 23. Relative to the net operating loss deduction allowed by section 23 (s), see section 19.208-1 (c). “Paid” includes “accrued” or “incurred” (construed according to the method of accounting upon the basis of which the net income is computed) during the taxable year, but does not include any estimate for losses incurred by not reported during the taxable year.

Sec. 19.207-4. *Required addition to reserve funds of mutual insurance companies (other than life).*—

Mutual insurance companies, other than life insurance companies, may deduct from gross income the net addition required by law to be made within the taxable year to reserve funds, including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds. Reserve funds "required by law" include not only reserves required by express statutory provisions but also reserves required by the rules and regulations of State insurance departments when promulgated in the exercise of an appropriate power conferred by statute, but do not include assets required to be held for the ordinary running expenses of the business, such as taxes, salaries, reinsurance, and unpaid brokerage. Only reserves commonly recognized as reserve funds in insurance accounting are to be taken into consideration in computing the net addition to reserve funds required by law. In the case of a fire insurance company the only reserve fund commonly recognized is the "unearned-premium" fund. For a general definition of "reserve fund" see section 19.203(a)(2)-1. * * *

Sec. 19.207-6. *Special deductions allowed mutual insurance companies (other than life or marine).*—Mutual insurance companies (including inter-insurers and reciprocal underwriters, but not including mutual life and mutual marine insurance companies), which require their members to make premium deposits to provide for losses and expenses, are allowed to deduct from gross income the aggregate amount of premium deposits returned to their policyholders or retained for the payment of losses, expenses, and reinsurance reserves. In determining the amount of premium deposits retained by a mutual fire or mutual casualty insurance company for the payment of losses, expenses, and reinsurance reserves, it will be presumed that losses and expenses have been paid out of earnings and profits other than premiums to the extent of such earnings and profits. If, however, any portion

of such amount is applied during the taxable year to the payment of losses, expenses, or reinsurance reserves, for which a separate allowance is taken, then such portion is not deductible; and if any portion of such amount for which an allowance is taken is subsequently applied to the payment of expenses, losses, or reinsurance reserves, then such payment cannot be separately deducted. The amount of premium deposits retained for the payment of expenses and losses, and the amount of such expenses and losses, may not both be deducted. * * *

No. 12433

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BENEFIT SOCIETY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

FILED

MAY 17 1950

PAUL P. O'BRIEN, -
CLERK

ROBERT R. WEAVER,
403 First National Bank Building,
Phoenix, Arizona,
Attorney for Petitioner.

TOPICAL INDEX

PAGE

Statement	1
Argument	3

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Ins. Co. of Texas v. Thomas, 146 F. 2d 434.....	12
First National Benefit Society v. Stuart, 134 F. 2d 438.....	3
First National Benefit Society v. Stuart, 152 F. 2d 298.....	3
Helvering v. Inter-Mountain Life, 294 U. S. 686.....	4
Pioneer Mutual Benefit Society v. Corporation Commission, 123 P. 2d 828.....	7

STATUTES

Arizona Code (1939), Annotated:

Secs. 53-601 to 53-622	1
Sec. 53-616	2
Sec. 53-609	8

Internal Revenue Code:

Sec. 201-(a)	3, 7, 10, 11, 13
Sec. 207	10, 11, 13

PROVISIONS

Arizona Constitution, Art. 14, Sec. 2.....	2
--	---

No. 12433

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BENEFIT SOCIETY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

Statement.

We believe that Respondent has correctly stated the jurisdictions and the questions presented in this case.

We agree with Respondent's statement on page 3 of his brief that during the year 1939, the one herein involved, Petitioner was engaged in business under the provisions of Section 53-601 to Sections 53-622, inclusive, 1939 Ariz. Code Anno.

Respondent in his statement (p. 3 of his brief) after setting out the finding of the Tax Court in the above language quoted the Tax Court as follows (taken from the Articles of Incorporation of the Petitioner):

"That the objects and purposes for which said Corporation is formed are: To engage in, conduct and carry on the business and customary activities of a mutual benefit association within the meaning and provisions of Sections 607-608-609-610 of Chapter 14 of Article 3 of the 1928 Revised Statutes of the State of Arizona as the same now exists; * * *"

The Constitution of the State of Arizona providing for incorporation under general laws reserves the right to alter amend or change the laws in regard thereto at any time. (Art. 14, Sec. 2, Ariz Const.)

These laws were amended, effective late in 1937 providing for entirely different set up in regard to reserves of such companies, and requiring all such companies to qualify under the new law if they were to remain in business, and the Tax Court actually found and indeed it was stipulated herein that Petitioner was during the year 1939, operating under the 1937 statutes. [R. p. 51.]

The 1937 Law, Section 16, Article 3, Chapter 14, Revised Code of 1928, was amended by adding Section 610a, which is 53-616, 1939 Arizona Code Annotated (p. 11, Appendix to Op. Br.), and reads as follows:

“610a. EXISTING CORPORATIONS. Any existing Corporations under the provisions of sections 607, 608, 609 and 610, article 3, chapter 14, Revised Code of 1928, shall be deemed to be lawfully incorporated, organized and existing and may continue its corporate existence and transact business under, and avail itself of the provisions hereof without reincorporating or requalifying, except that such corporation shall, on or before January 1, 1938, comply with the provisions hereof as to statutory agent, minimum membership, deposits of money or securities, benefit certificate, fidelity bond, and certificate of authority, and shall be subject to examination as herein provided. (Now section 53-616, A. C. 1939.)”

An entirely new law in regard to Mutual Benefit Societies was enacted in the 1937 statutes and the corporations already operating were merely given the right to qualify under the new law without reincorporating.

Argument.

I.

Under Topic I, Respondent states that the taxpayer was not a life insurance company in the taxable year within the meaning of Section 201(a) of the Internal Revenue Code.

Under sub-topic A thereof, he asserts that this Court has twice held that a taxpayer is not a life insurance company within statutory provisions identical with section 201 of the Internal Revenue Code, and cites two former cases involving the First National Benefit Society. First of these cases is, *First National Benefit Society v. Stuart*, 134 F. 2d 438, involved the years 1936 and 1937. During which time an entirely different law was in effect in the State of Arizona, a law which made no provision for reserves, deposits, examinations or supervision. The 1937 law did not go into effect until late in 1937, so that these years were not controlled by the 1937 law. In *First National Benefit Society v. Stuart*, 152 F. 2d 298, involving the year 1938 this Court did not affirmatively hold that the taxpayer was not a life insurance company, but stated that the taxpayer had not borne the burden of proof to show that it was a life insurance company, and did not state wherein the taxpayer had failed in that proof. Further the question as to whether or not the taxpayer is an assessment life insurance company was not raised heretofore.

In Sub-Topic B, Respondent sets out the definition of a life insurance company under Section 201 of the Internal Revenue Act, and under this topic he sets out the various classifications of insurance companies under the code. However, it is apparent under these sections that

Congress has never attempted to distinguish between two types of life insurance companies. Respondent has pointed out that the type of life insurance company provided for under the provisions, under which taxpayer is operating are not a part of the general insurance laws of the state. We wish to add that neither are fraternal insurance companies provided for under the general insurance law, and that they when they are engaged in a life insurance business, without argument by Respondent held to be life insurance companies. It should be noted also that the general insurance laws of the State of Arizona and other states provide not only for life insurance companies but many other types of insurance companies, so that the mere fact that a taxpayer is a corporation provided for under the general insurance laws has nothing to do with whether or not it is a life insurance company.

On page 17, under the same topic, Respondent quotes from the case of *Helvering v. Inter-Mountain Life Ins. Co.*, 294 U. S. 686, 690. This case did not have under consideration the matter of classification of life insurance companies at all, but the question of a deduction allowed to life insurance companies out of interest earnings. This case is merely to the effect that reserves held for the liquidation of accrued endowment coupons was not a part of its insurance reserves. The last sentence of this case quoted by Respondent reads as follows:

“In life insurance the reserve means the amount, accumulated by the company out of premium payments, which is attributable to and represents the value of the life insurance elements of the policy contracts.”

but if Respondent had continued with the quotation, he would have found the following:

“The premiums include enough over and above what is needed to maintain proper insurance reserves, to provide for the discharge of coupon liability according to the terms of the policy. The coupon values are the equivalent of cash and may be used to pay premiums on the face amount of the policy, to procure additional insurance to lessen the number of annual premiums or otherwise to obtain insurance protection. The amounts so applied cease to exist as coupon liabilities and automatically become a part of the life insurance reserves. They differ essentially from coupon liability. Life Insurance matures only upon death of the insured and the reserve is based upon that contingency whereas the liability on the matured coupons depends upon no contingency. It follows that the insuring reserves alone constitute the base on which the deduction is to be computed. Reserves against matured coupons are excluded.”

In other words the Court in this decision as in all other decisions we have read is not attempting to set up or require a standard for monetary valuation of a policy, which would be of value to a regulatory statute, but to distinguish between the endowment, investment, or other features of a policy and the insurance element. That is, only those reserves which are held against the contingency of death or life insurance reserves, since that contingency grows greater year by year. Respondent's argument to the effect that taxpayer did not maintain the reserve contemplated by Congress for the reason that it was not deposited in a separate bank account is again an attempt to place a regulatory intention on the part of Congress rather than a classification for taxation purposes.

The accounting practice of practically all companies recognized by Respondent as life insurance companies is identical with that of taxpayer, and that the only segregation of reserves is upon the books of the corporation.

In his work of life insurance accounts E. C. Wightman Second Edition in Chapter 4, makes the following statement:

“The only item which appears upon the liability statement which can be taken from the accounts within the bookkeeping system is the amount of paid-up Capital. All of the other liability items are obtained either from memorandum accounts or through inventory methods. It should be noted that liabilities which are secured by the pledge of specific assets appear in the Annual Statement as deductions from the assets rather than as liabilities. Inasmuch also as all debits and credits to agents’ accounts are controlled through a single general ledger account without regard to whether such accounts may show a debit or a credit balance on any specific date, the total of those accounts which do show a credit balance as of the date of the Annual Statement and which are really liabilities is reported on the assets statement as a deduction from the total of those accounts which show a debit balance at that time.”

It should be borne in mind that the Petitioner set up its reserves by daily placing in a mortuary account those funds required by the law to be placed in its mortuary fund and which were designated on the books of the corporation as assessments [Exhibit 4 attached to the Stipulation on file herein] and [Exhibit 6 attached to the Stipulation], also that the funds set aside as mortuary funds by Petitioner have never been used for any purpose but that of paying death claims, but as a matter of fact expense funds were

many times transferred to the mortuary fund and used to pay death claims. [R. p. 53.]

In Sub-Topic C, of Respondent's Brief, Respondent's contention is that since the interest earned on the deposit with the State could be used for ordinary running expenses, that the deposit itself could not be regarded as a reserve required by law. The law here referred to does actually require that this reserve be set aside for the liquidation of its contracts, and has been so interpreted by the Arizona Supreme Court in *Pioneer Mutual Benefit Society v. Corporation Commission*, 123 P. 2d 828.

In Sub-Topic D, beginning on page 21 of his brief Respondent has taken the position evidently that only a "legal reserve" was contemplated by Congress in the enactment of Section 201 of the Internal Revenue Act. If either Congress in enacting the law or the Treasury Department in promulgating its regulations had set out the term "legal reserve" then that simple term would have disposed of all argument, but neither the statutes nor the regulations uses this term. The term "legal reserve" is the one applied to a bookkeeping system wherein a separate reserve is set up for each individual policy as against a tabular reserve which is a reserve against the insurer's total contingent liability. The only way in which the term "legal reserve" could be applied under the code, the decisions, or the regulations involved herein, is that they be reserves required by the law of the state in which the insurer is operating. The regulations themselves (Treasury Regulation 103, Sec. 19.203(a)(2)-1) read in part as follows:

"Sec. 19.203(a)(2)-1. Reserve funds.—In general, the reserve contemplated is a sum of money, variously

computed or estimated, which, with accretions from interest, is set aside (reserved) as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims.”

This is the only requirement by either the code or the regulations as to the form of the required reserves. Respondent further continues on page 22 of his brief that the cases which he cites do not disapprove the regulations.

After contending that the reserves required by the Arizona statutes are subject to certain defects in the statutory requirements, Respondent on the bottom of page 23 of his brief says:

“As already noted, since taxpayer has not proved the existence of any reserve fund at all, on the language of the statute alone without taking into consideration the Regulations, the decision below was correct.”

This statement we do not understand, since the Arizona law, Section 53-609, 1939 Arizona Code Annotated (p. 7, Appendix to Op. Br.), provides and requires the setting aside of a Mortuary Reserve Fund and since this statute has been construed in the *Pioneer Mutual Benefit Society v. Corporation Commission*, 123 P. 2d 828, to authorize the State Insurance Commissioner's requirements of the amounts that must be set up in said reserves, and since said reserve was actually set aside for the purpose of paying death claims, and since no other item ever was charged to the mortuary fund of the taxpayer, except the payment of income taxes after the Commissioner

had threatened to seize, and which was thereafter replaced. It appears to us that Respondent's approach to this question is one which regards the law and the Regulations of the Treasury Department as setting up certain requirements in regard to reserves which the laws of the various states must conform to in order that the insurer organized and operating thereunder may obtain some special privilege granted by Congress in regard to income taxation.

We believe that the proper approach is one that regards both the law and the regulations as setting up distinctions between different types of insurance business based upon the character of the business actually transacted by the insurer. We believe that no purpose would be served in rehashing the history of this legislation which was enacted as a result of the successful contention by the insurance companies that level rate premiums covering an increasing liability from year to year must build up in the earlier years a reserve against that increased liability, and that the sums accumulated in the earlier years against a contingency which is sure to happen, is not income but rather a contribution to assets. At any rate regardless of intent, the actual result is that any other life insurance company, except a legal reserve company or post mortem assessment company is by this statute prohibited from doing business for no insurance company can pay an income tax of from 16 to 38 per cent of the addition to its reserves, and stay in business when its competitors do not pay this tax.

II.

In his first paragraph under the above number on page 24 of his brief Respondent contends that if the taxpayer is to be classified under Section 207, it is still not entitled to a deduction for additions required by law within the taxable year to reserve funds within the meaning of Section 207(c)(1)(A) in the sum of \$4,518.71. Respondent appears to believe that it is Petitioner's contention that it would be entitled to such deduction because it is an assessment company. We did not mean to leave this impression. Our contention that Petitioner is an assessment life insurance company we believe should classify it under Section 201. And this classification we believe depends upon whether or not the ordinary term of assessment life insurance should be used which includes even stipulated premiums of assessments paid in advance subject to further assessment if necessary or whether the term is to be limited as Respondent contends to post mortem assessment companies now almost non-existent.

It is our contention that Petitioner is entitled to a deduction under the above subsection of Section 207 of the amount deposited with the State Treasurer of the State of Arizona, during the year 1939, since the same was required by law to be so deposited, and since if the company should be classified under 207, the term "legal reserve" could not be intended or a similar reserve for the reason that if classified under 207, the Petitioner (in spite of the fact that its business is actually life insurance), that therefore the defects in such life insurance reserves surely could not be urged under such a classification. We cannot believe that Respondent actually contends that the addition referred to under this subsection is the same type of reserve as that required for classification under Sec-

tion 201 of the code, and yet it is our understanding from Counsel's contention that the deduction cannot be allowed because the reserves provided for under this subsection of 207 do not conform to what he regards as the requirements for classification under 201 of the Code. How can it be contended as Respondent states on page 25 of his brief, that Petitioner's Mortuary Reserves are reserves held for the ordinary running expenses of its business.

At the risk of seeming to repeat, it appears from Counsel's argument that Respondent's contention is that Petitioner is not entitled to be classified as a life insurance company because its reserves are not the type of reserves contemplated by the law to be classified as such a company, and that Petitioner should therefore be classified as an insurance company other than life under Section 207, so that it is not entitled to a deduction provided for under 207 because its reserves are not the type contemplated by Section 207, for the reason that they are not the reserves contemplated by Section 201.

III.

Under this number on page 26 of its brief, Respondent appears to take the position that Petitioner had abandoned his claim for deduction under Section 207(c)(3) of the Internal Revenue Code, which provides for a deduction of money held out of premium deposits either returned to the policyholders or retained for the payment of losses, expenses and reinsurance reserves. The Tax Court likewise appeared to believe that Petitioner had abandoned this contention, but Petitioner has never done so. In order to deprive Petitioner of this deduction the term "retained for payment of losses" would have to be interpreted to mean "retained for payment of *accrued* losses."

In *American Ins. Co. of Texas v. Thomas*, 146 F. 2d 434, the United States Court of Appeals for the 5th Circuit had before it the matter of classifying an insurance company for taxation purposes. The Court never actually classified the insurer under any section, but held that the funds placed in a reserve against the fulfillment of future claims was not income. In making this decision the Court said:

“It could hardly be maintained that a premium was entirely earned if there yet remained something to be done in later years by the insurer as a part of the consideration of its receipt. The State of Texas has determined that seventy per cent of the premiums should be placed in an inviolable fund for the fulfillment in the future of the insurer’s obligation to be insured, and the premium is not entirely earned until the obligation is fulfilled.

“So much of the premiums as go into such fund and remain therein after the paying of all losses and charges against said fund could not be characterized as earned premium or as net underwriting income, nor could it be characterized as net investment income under Sec. 204.

“Whatever part of the taxed sums as were derived from insurance premiums and were a part of the increase in the Mortuary Fund of Appellant should have been held to be unearned premiums and deductible from the underwriting income even though the Appellant was not a mutual insurance company.”

We submit therefore, that the Petitioner is a life insurance company, and that if it is not a life insurance company, but rather an insurance company other than life under Section 207 of the Internal Revenue Code it is entitled to the deductions provided for in said section without the requirement that its reserves be those contemplated under Section 201, and that in all events the money accumulated in a reserve fund by Petitioner to fulfill its future obligations which were placed upon its books at the time its policies were written, is not income, but held in trust for its policyholders, and that the decision of the lower Court herein should be reversed.

Respectfully submitted,

ROBERT R. WEAVER,

Attorney for Petitioner.

No. 12433

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BENEFIT SOCIETY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S PETITION FOR REHEARING.

ROBERT R. WEAVER,

403-4 First National Bank Building, Phoenix, Ariz.,

Attorney for Petitioner.

FILED

AUG 10 1950

PAUL P. O'BRIEN,

CLERK

TABLE OF AUTHORITIES CITED

CASES	PAGE
Commissioner v. National Reserve Ins. Co., 160 F. 2d 956.....	2
First National Benefit Society v. Stuart, 134 F. 2d 438.....	2
STATUTES	
Internal Revenue Act, Sec. 201.....	3
Internal Revenue Act, Sec. 207	2, 3
Internal Revenue Act, Sec. 207(c)(1)(A).....	2, 3
Internal Revenue Act, Sec. 207(c)(3).....	2

No. 12433

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BENEFIT SOCIETY, a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S PETITION FOR REHEARING.

The Petitioner above named respectfully petitions the court to grant a rehearing upon the above numbered and entitled appeal, and in support of such request shows unto the court:

The above matter was heard by this Court on review from the decision of the Tax Court of the United States. A *per curiam* decision was rendered by this Court on July 11, 1950 as follows:

The decision of the Tax Court is affirmed upon the authority of *First National Benefit Society v. Stuart*, 9 Cir., 134F. 2d 438; *Id.*, 9 Cir., 152 F. 2d 298; *Commissioner v. National Reserve Ins. Co.*, 9 Cir., 160 F. 2d 956."

The case of *First National Benefit Society v. Stuart*, 9 Cir., 134 F. 2d 438, did not involve the matter of the deduction claimed by Petitioner under the provisions of Section 207(c) (1) (A), which reads as follows:

(A) the net addition required by law to be made within the taxable year to reserve funds (including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds);

This matter was not involved in the above cited case. The opinion in that case did dispose of Petitioner's contention that it was entitled to a deduction under the provisions of Section 207(c)(3) adversely to Petitioner, but neither the briefs nor the decision of the Court in that case involved the above claim for a deduction of the amounts added during the year to the guarantee fund deposited with the Arizona State Treasurer.

From an examination of the case of *Commissioner v. National Reserve Ins. Co.*, 9 Cir., 160 F. 2d 956, it appears that this question was not raised in that case. There is a discussion of the above decision of the deposit required by the Arizona Benefit Association law to be made with the State Treasurer. However, that discussion appears to be relative to the qualification of that reserve as a part of the necessary reserve to qualify the taxpayer as a life insurance company, and not as to a deduction under 207(c)(1)(A), if the taxpayer is to be classified under Section 207. This deduction was claimed by Petitioner in the present case and was considered by the Tax

Court which held against the deduction, but we believe the matter of this deduction has not been passed on by this Court.

The fact that this deduction of additions to guarantee or reserve funds is provided for in the case of companies classifying under 207 of the Act indicates that the word "guarantee" or "reserve" funds is not required to be the technical life insurance reserve required for the classification of a taxpayer as a life insurance company otherwise the classification would be under 201 rather than 207.

This Court in its opinion above cited has held that Petitioner is a Mutual Insurance Company other than life under the provisions of Section 207. This also has been the holding of the Tax Court and the Treasury Department.

Since the reserve, additions to which constitute a deduction under 207(c) (1) (A) are allowed to companies whose reserves do not classify them as life insurance companies this "reserve" must be something different than that contemplated in Section 201.

We submit then that Petitioner is entitled to a deduction under the provisions of said Section 207(c) (1) (A) in the sum of \$4,518.71 deposited with the State Treasurer during the year 1939, and that Petitioner should have a rehearing in this particular.

Respectfully submitted,

ROBERT R. WEAVER,

Attorney for Petitioner.

Certificate of Counsel.

I, Robert R. Weaver, counsel for the Petitioner above named, hereby certify that, in my judgment, the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Witness my hand this 9th day of August, 1950.

ROBERT R. WEAVER,

Attorney for Petitioner.

United States
COURT OF APPEALS
for the Ninth Circuit

H. S. LEASE and H. S. LEIGHLAND, copartners
doing business under the firm style and name of
Lease and Leighland, SEABOARD SURETY
COMPANY, a corporation, YORKSHIRE IN-
DEMNITY COMPANY, a corporation and
EMPLOYERS REINSURANCE CORPORA-
TION, a corporation,

Appellants,

vs.

CORVALLIS SAND AND GRAVEL COMPANY,
and JOHN H. GALLAGHER, INC.,

Appellees.

APPELLANTS' AMENDMENT TO BRIEF

Appeal from the United States District Court for the
District of Oregon.

WILBUR, BECKETT, OPPENHEIMER, MAUTZ & SOUTHERN,
E. K. OPPENHEIMER,
ARNO H. DENECKE,

1001 Board of Trade Building,

Portland 4, Oregon,

Attorneys for Appellants.

FILED

SEP 12 1950

PAUL P. O'BRIEN, CL

United States
COURT OF APPEALS
for the Ninth Circuit

H. S. LEASE and H. S. LEIGHLAND, copartners
doing business under the firm style and name of
Lease and Leighland, SEABOARD SURETY
COMPANY, a corporation, YORKSHIRE IN-
DEMNITY COMPANY, a corporation and
EMPLOYERS REINSURANCE CORPORA-
TION, a corporation,

Appellants,

vs.

CORVALLIS SAND AND GRAVEL COMPANY,
and JOHN H. GALLAGHER, INC.,

Appellees.

APPELLANTS' AMENDMENT TO BRIEF

Appeal from the United States District Court for the
District of Oregon.

Appellants desire to amend their brief at page 34 by
inserting the following matter after the quotation from
transcript, page 79, testimony of Professor Thomas, to-
wit:

"That Professor Thomas' recollection that he never recommended less than $4 \frac{2}{3}$ sacks of cement is unequivocally supported by the various letters which he wrote, to-wit:

Professor Thomas wrote to Corvallis Sand & Gravel Co. on July 21, 1947 in part as follows (Deft.'s Ex. 25):

"On account of the slightly finger grading of the coarse aggregate and because of the narrow margin we have had in regard to strength of the tested cylinders, it might seem best as long as your coarse aggregate continues of this somewhat finer maximum size, to use the mix as recommended below for a $1\frac{1}{2}$ cubic yard basis.

Cement	$7\frac{1}{2}$ sks.
Sand	0.85 cu. yd.
#2 Gravel	0.495 cu. yd.
#1 Gravel	0.618 cu. yd.
Darex	4 fl. oz.

Water to give 2"-3" slump"

Professor Thomas wrote to Corvallis Sand & Gravel Co. on August 7, 1947 in part as follows (Deft.'s Ex. 26):

"Recommended Batch Weights for $1\frac{1}{2}$ cu. yd. Concrete

W/C Ratio—5.92 gal/sk

Slump—4 in.

Material weights:

Cement, $7\frac{1}{2}$ sks. or 705 lb.	
Water	241 lb. (allowing for free moisture in agg—5% sand, 1% in gravel)
Darex	4 fl. oz.
Sand	2124 lb.
#2 Gravel	687 lb.
#1 Gravel	2180 lb.
<hr/>	
Total	5944 lb. or 3955 lb./cu. yd."

Professor Thomas wrote to Corvallis Sand & Gravel Co. on August 12, 1947 in part as follows (Deft.'s Ex. 27):

"The proportions are as follows:

Cement	7 sks. or 658 lb.
Water (to add)	32.6 gal. or 272 lb.
Sand (5% moisture)	1560 lb.
#3 Gravel (1% moisture)	480 lb.
#2 Gravel (1% moisture)	1440 lb.
#1 Gravel (1% moisture)	1440 lb.
Slump 2 in.) Lab specimen
Air Voids 3.2%) hand mixed
Estimated strength at 28 days—2860 psi	
at 7 days—1505 psi"	

Professor Thomas wrote to Corvallis Sand & Gravel Co. on September 3, 1947 in part as follows (Deft.'s Ex. 29):

"To produce $1\frac{1}{2}$ cu. yd. of mixed concrete in place, assumed as containing 2% dispersed air-voids, the necessary quantities are as follows:

Cement	7 sks. or 658 lb.
Water (to add)	32.5 gal. or 271 lb. (to give approx. 4 in. slump)
Sand (5% moisture)	1712 lb.
#2 gravel (1% moisture)	1438 lb.
#1 gravel (1% moisture)	1838 lb.
Darex	4 fl. oz.
Total Weight	<hr/> 5917 lb."

Professor Thomas wrote to Corvallis Sand & Gravel Co. on September 5, 1947 in part as follows (Deft.'s Ex. 30):

“Recommended Proportions for $1\frac{1}{2}$ cu. yd. Batch
(accurately 1.492 cu. yd.)

Darex	(4 fl. oz.)
Cement	7 sks. or 658 lb.
Water (to add)	31.6 gal. or 263 lb. (on basis of 3 in. slump)
Sand (5% moisture)	2130 lb.
#2 Gravel ($\frac{1}{2}\%$ moisture)	1196 lb.
#1 Gravel ($\frac{1}{2}\%$ moisture)	1535 lb.
Total	5782 lb.”

Professor Thomas wrote to Corvallis Sand & Gravel
Co. on October 8, 1947 in part as follows (Deft.’s Ex. 34):

“Proportions Adjusted to 8-Sack Batch (W/C
6.4 gal./sk.)

Cement, 8 sks. or	752 lb.
Darex, 4 fl. oz.	
Water (to add)	284 lb. or 34.1 gal.
Sand (5% moisture)	2248 lb.
#2 gravel	1289 lb.
#1 gravel	1655 lb.
Wt. of batch	6228 lb. or 1.60 cu. yd.
Wt. cu. yd.	3894 lb.”

Respectfully submitted,

WILBUR, BECKETT, OPPENHEIMER, MAUTZ & SOUTHER,
E. K. OPPENHEIMER,
ARNO H. DENECKE,
Attorneys for Appellants.

No. 12436

United States
Court of Appeals
For the Ninth Circuit.

PACIFIC MAGNESIUM, INC., (formerly Socal
Magnesium, Inc.),

Appellant,

vs.

HARRY C. WESTOVER, individually and as Col-
lector of Internal Revenue for the Sixth Dis-
trict of California,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California
Central Division.

FILED

FEB 2 - 1950

PAUL P. O'BRIEN,
CLERK

No. 12436

United States
Court of Appeals
For the Ninth Circuit.

PACIFIC MAGNESIUM, INC., (formerly Socal
Magnesium, Inc.),

Appellant,

vs.

HARRY C. WESTOVER, individually and as Col-
lector of Internal Revenue for the Sixth Dis-
trict of California,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of Defendant, Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California	7
Certificate of Clerk	76
Complaint	2
Condensation of the Testimony of Ralph D. Sweeney	30
—direct	30
—examination by the court	34
—cross	34
Conditions of Cash Bond	36
Designation of Portions of Record on Appeal..	39
Exhibit, Defendant's:	
A—Claim for Refund, Statement and Cer- tificate	69
Exhibit, Plaintiff's:	
No. 1—Stipulation	40
Findings of Fact and Conclusions of Law	26
Conclusions of Law	27
Findings of Fact	26

INDEX	PAGE
Judgment	29
Names and Addresses of Attorneys	1
Notice of Appeal	35
Opinion	11
Order on Decision	25
Statement of Points Relied on	37
Statement of the Points on Which Appellant Intends to Rely and Designation of the Parts of the Record Necessary for the Considera- tion Thereof	78

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MELVIN D. WILSON,
819 Title Insurance Bldg.,
Los Angeles 13, Calif.

For Appellee:

ERNEST A. TOLIN,
United States Attorney,

E. H. MITCHELL,

EDWARD R. McHALE,
Assistants U. S. Attorney,

EUGENE HARPOLE,

ROBERT D. SCOTT,

JAMES D. PETTUS,
Special Attorneys,
Bureau of Internal Revenue,
600 U.S. Post Office and Court House Bldg.,
Los Angeles 12, Calif.

In the District Court of the United States for the
Southern District of California, Central Division

No. 8685-Y

PACIFIC MAGNESIUM, INC. (formerly So-Cal
Magnesium, Inc.),

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as Col-
lector of Internal Revenue for the 6th District
of California,

Defendant.

COMPLAINT

(For the Recovery of Federal Income Tax)

The complaint of the plaintiff respectfully shows
to this Court and alleges:

I.

That at all the times herein mentioned, the plain-
tiff was and now is a corporation organized under
the laws of California, having its principal place
of business at 1201 El Vago, La Canada, California.
Its name formerly was So-Cal Magnesium, Inc.

II.

That at all the times herein mentioned the defend-
ant was, and now is, the duly appointed Collector
of Internal Revenue for the 6th District of Cali-
fornia.

III.

That on or about March 15, 1945, plaintiff duly filed with the defendant, the Collector of Internal Revenue for the 6th District of California, its income and excess profits tax returns for the calendar year 1944 in accordance with the Internal Revenue Code. Its excess profits tax return showed no tax due.

IV.

That on October 15, 1947, plaintiff received from the Commissioner of Internal Revenue, Washington, D. C., a letter issued under the provisions of Section 272 of the Internal Revenue Code, proposing a deficiency of \$36,352.39 in excess profits tax for the calendar year 1944, claimed to be due from plaintiff.

V.

On November 14, 1947, plaintiff paid to defendant, the Collector of Internal Revenue for the 6th District of California, the \$36,352.39 so demanded by the Commissioner of Internal Revenue, together with interest thereon, from March 15, 1945, at 6% per annum, amounting to \$5,816.38.

VI.

On March 12, 1948, plaintiff filed with the defendant, Collector of Internal Revenue for the 6th District of California, its claim for the refund of excess profits tax for the calendar year 1944 in the amount of \$30,487.39, plus interest paid thereon in the amount of \$4,877.98, plus statutory interest on

both of such amounts. The grounds for the claim were the same as are set forth in this complaint.

VII.

Neither the defendant nor the Commissioner of Internal Revenue, nor any one else, has refunded to plaintiff said \$30,487.39, and interest of \$4,877.98, or any other amount.

VIII.

Said claim for refund has been on file for six months and this suit is brought under the provisions of Section 3772 of the Internal Revenue Code.

IX.

This claim for refund has not been assigned by plaintiff to any one and is now the property of plaintiff.

X.

All of the outstanding capital stock of plaintiff, and all of the outstanding capital stock of So-Cal Foundry was owned, directly or indirectly, by P. H. Sheedy. P. H. Sheedy was president of both corporations and a director of both. So-Cal Foundry claimed that plaintiff owed So-Cal Foundry \$39,335.07.

XI.

One Frank Gaines was an officer of both of the above-named corporations, and wished to purchase the stock of So-Cal Foundry. On November 20, 1944, Messrs. Sheedy and Gaines entered into a contract under the terms of which Frank Gaines pur-

chased from P. H. Sheedy all of the stock of So-Cal Foundry and further agreed that Gaines would cause So-Cal Foundry to compromise and settle for \$4,000.00 the \$39,335.07 claim of So-Cal Foundry against plaintiff. The terms of said contract were carried out in 1944.

XII.

The Commissioner of Internal Revenue determined that the \$35,335.07 by which plaintiff reduced its debt constituted income to plaintiff, and that said \$35,335.07 was not includable in plaintiff's invested capital from November 20, 1944, either as ordinary invested capital or as new capital, as defined in Section 718(a)(2) and (a)(6) of the Internal Revenue Code.

XIII.

Plaintiff alleges that either (1) plaintiff paid to So-Cal Foundry all that it was able to pay and had no net worth after the settlement of November 20, 1944, and hence did not realize income from the settlement of the debt or (2) So-Cal Foundry intended to, and did, make a gift to plaintiff and consequently the settlement would not be income to plaintiff or (3) P. H. Sheedy, the principal stockholder of plaintiff made a contribution to plaintiff's capital which did not constitute income to plaintiff. If any of the above propositions is the correct solution, then plaintiff would have an increase in its invested capital as new invested capital as of November 20, 1944 in the amount of \$35,335.07 and would have an excess profits credit based thereon.

XIV.

Plaintiff's correct excess profits tax liability for the calendar year 1944 was \$5,865.00. It has paid to the defendant on account of this 1944 excess profits tax liability \$36,352.39. It has overpaid to the defendant its excess profits tax for the year 1944 in the amount of \$30,487.37, plus interest thereon of \$4,877.98.

XV.

That by reason of the premises defendant became, and is, indebted to plaintiff in the sum of \$35,365.35, plus statutory interest thereon from November 14, 1947.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$35,365.35, plus interest thereon at 6% per annum from November 14, 1947, together with plaintiff's costs of suit, and such other relief as seems proper to the Court.

/s/ MELVIN D. WILSON,

/s/ JOSEPH D. PEELER,

Attorneys for the Plaintiff.

State of California,
County of Los Angeles—ss.

Thomas Sheedy, being first duly sworn, deposes and says that he is the Secretary of Pacific Magnesium, Inc.; that he has read the foregoing Complaint and knows the contents thereof; and that the

statements contained therein are true of his own knowledge.

/s/ THOMAS SHEEDY.

Subscribed and Sworn to before me this 18th day of September, 1948.

[Seal] /s/ JOHN EDWARD WEAVER,
Notary Public, in and for said County and State.

My Commission Expires April 6, 1951.

[Endorsed]: Filed September 23, 1948.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, HARRY C. WEST-
OVER, COLLECTOR OF INTERNAL REV-
ENUE FOR THE SIXTH COLLECTION
DISTRICT OF CALIFORNIA

Comes Now Defendant and for his answer to the Complaint of the plaintiff herein, admits, denies, and alleges:

I.

Admits the allegations contained in paragraph I of the Complaint.

II.

Admits the allegations contained in paragraph II of the Complaint.

III.

Denies the allegations contained in paragraph III of the Complaint, except that it is admitted that on March 15, 1945, plaintiff filed with the defendant its income and excess profits tax returns for the

calendar year 1944, and that its excess profits tax return showed no tax due.

IV.

Admits the allegations contained in paragraph IV of the Complaint. Alleges that on March 8, 1948, the Commissioner of Internal Revenue assessed excess profits taxes in the amount of \$36,352.39 with interest of \$6,493.13, or a total of \$42,845.52, for 1944.

V.

Denies the allegations contained in paragraph V of the Complaint, except that it is admitted that on November 14, 1947, plaintiff paid to defendant on account of the excess profits tax and interest for 1944, the sum of \$41,116.59. Alleges that on March 23, 1948, the sum of \$1,043.72 was credited on such tax and interest, leaving a balance unpaid of \$685.21.

VI.

Admits the allegations contained in paragraph VI of the Complaint, and denies the allegations contained in the claim for refund except to the extent that similar allegations in the Complaint are admitted in this Answer.

VII.

Admits the allegations contained in paragraph VII of the Complaint, but alleges that such tax and interest were credited with the amount of \$1,043.72 as alleged in paragraph V hereinabove.

VIII.

Admits the allegations contained in paragraph VIII of the Complaint.

IX.

Alleges that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IX of the Complaint and on that ground denies the same.

X.

Alleges that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of the Complaint and on that ground denies the same, except that it is admitted that the plaintiff represented to the Commissioner that the facts were as therein alleged.

XI.

Alleges that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XI of the Complaint, and on that ground denies the same, except that it is admitted that the plaintiff represented to the Commissioner that the facts were as therein alleged.

XII.

Admits the allegations contained in *paragraph of* the Complaint.

XIII.

Denies the allegations contained in paragraph XIII of the Complaint.

XIV.

Denies the allegations contained in paragraph XIV of the Complaint, except that it is admitted that plaintiff paid to defendant on account of its excess profits tax liability for 1944 the sum of \$36,352.39.

XV.

Denies the allegations contained in paragraph XV of the Complaint.

Wherefore the Defendant demands judgment dismissing the action together with the costs and disbursements of the action.

Dated: This 21st day of April, 1949.

JAMES M. CARTER,

United States Attorney,

E. H. MITCHELL and

EDWARD D. McHALE,

Assistant U. S. Attorneys,

EUGENE HARPOLE,

ROBERT D. SCOTT and

JAMES D. PETTUS,

Special Attorneys,

Bureau of Internal Revenue,

By /s/ EUGENE HARPOLE,

Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed April 21, 1949.

In the United States District Court, Southern
District of California, Central Division
No. 8685-Y

PACIFIC MAGNESIUM, INC. (formerly Socal
Magnesium, Inc.),
Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,
Defendant.

Appearances

For the Plaintiff:

MELVIN D. WILSON,
Los Angeles, California.

For the Defendant:

JAMES M. CARTER,
United States Attorney,
E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys,
EUGENE HARPOLE,
ROBERT D. SCOTT and
JAMES B. PETTUS,
Special Attorneys,
Bureau of Internal Revenue,
All of Los Angeles, California.

Yankwich, District Judge:

OPINION

Prior to November 20, 1944, P. H. Sheedy was

sole stockholder of Pacific Magnesium, Inc., the plaintiff, then known as Socal Magnesium, Inc., under certificates issued to him in his own name, as trustee and to another corporation of which he was sole stockholder. He was also the sole stockholder, either in his own name or as beneficiary under a trust, of Socal Foundry, to be referred to as Socal. Throughout the year 1944, Sheedy was president and director of both corporations. Frank Gaines had, prior to June, 1944, been an officer, director and general manager of both corporations. On November 20, 1944, he was not an officer or director of either. On November 20, 1944, an agreement was entered into by Sheedy and Gaines, by which Sheedy sold to Gaines a \$14,000.00 note of Socal, held by Sheedy, and all the Socal shares. Gaines paid \$56,000.00 in cash and promised to cause Socal Foundry to accept \$4,000.00 in settlement of a debt of \$39,335.07 owed to Socal by the plaintiff.

The Preamble of the Agreement contained the following reference to this obligation:

“Whereas, Socal Foundry claims that Socal Magnesium, Inc. is indebted to it in the approximate amount of Thirty-nine Thousand, Three Hundred Thirty-five and 07/100th Dollars (\$39,335.07), not including the amount due Socal Foundry for Socal Magnesium, Inc., herein referred to as the Permanent Mold Account in the approximate sum of Six Thousand Six Hundred Ninety and 48/100ths Dollars (\$6690.48) and not including the amount due

Socal Foundry by Socal Magnesium, Inc., known as Inventory of Metal Account, in the approximate amount of Nine Hundred Four and 40/100ths Dollars (\$904.40)''

After reciting the reciprocal undertakings of the parties, the Agreement contained this promise by Gaines as to the claim:

“(d) To cause Socal Foundry to compromise and settle its claim against Socal Magnesium, Inc. in the aforesaid amount of Thirty-nine Thousand Three Hundred Thirty-five and 07/100ths Dollars (\$39,335.07) by payment by Socal Magnesium, Inc. to Socal Foundry of the sum of Four Thousand Dollars (\$4,000) and Mr. Gaines personally agrees that he will save and hold Mr. Sheedy and Socal Magnesium, Inc., its officers, stockholders and directors wholly and completely harmless from any and all liability, claims or demands of whatever nature arising from or which may accrue to or be asserted against Socal Magnesium, Inc. by reason of said compromise and settlement of said claim;”

To carry into effect the Agreement, Gaines and his nominees were, on the same day, elected directors and officers of Socal in the place of Sheedy and his nominees.

To carry into effect the promises in the Agreement relating to the liquidation of the debt, the following Resolution was adopted by the new directorate:

“Whereas Socal Magnesium Inc., a California corporation, is indebted to this corporation in the

approximate sum of \$39,335.07, not including the amount due by said Socal Magnesium Inc. to this corporation on its Permanent Mold Account or Inventory of Metal Account, and

“Whereas it is the belief of the directors of this corporation that said Socal Magnesium Inc. is unable to pay its said debt and that if this corporation can obtain the sum of \$4000.00 from said Socal Magnesium Inc. in settlement of said debt, that it would be a wise and proper thing to do.

“Now, Therefore, Be It Resolved that this corporation accept from Socal Magnesium Inc. the sum of \$4000.00 as payment in full of all monies and other things of value that may be due and owing to this corporation from Socal Magnesium Inc., except that this does not pertain to the account known as Permanent Mold Account and the account known as Inventory of Metal Account now owing to this corporation as aforesaid.

“Resolved Further that the President and Secretary of this corporation be and they are hereby authorized and directed to execute a General Release in the name of and for and on behalf of this corporation, and to affix the corporate seal thereto, releasing said Socal Magnesium Inc. from the payment of any monies owing to this corporation, except as aforesaid, in consideration of the payment of \$4000.00 by Socal Magnesium Inc. to this corporation.”

The balance sheet of the plaintiff as of October 13, 1943, listed the debt owed to Socal in full as a liability. Its balance sheet of December 31, 1949,

showed a cancellation of the debt. The result was achieved in this manner. The plaintiff paid Socal \$4000.00 in cash, credited capital surplus with \$35,335.07, and debited a similar amount to "accounts payable Socal Foundry". In this manner, the plaintiff's excess of assets over liabilities, exclusive of the capital stock, showed an increase of \$35,335.07. Plaintiff had a clear net worth both before and after the transaction, and on December 31, 1944, showed an earned surplus of \$7,789.99. Socal deducted on its 1944 return a loss of \$35,335.07 on account of the cancellation of the debt, which the Commissioner allowed as a loss. However, because of other deductions, it derived no tax benefit from this allowance. In its income and excess profit tax return, for the year, plaintiff claimed a deduction in the amount of \$35,335.07. The Commissioner disallowed this, and on October 15, 1947, he proposed a deficiency of \$36,353.39 in excess profits tax for the calendar year 1944, claimed to be due from the plaintiff. The plaintiff paid the deficiency, with interest from March 15, 1945, amounting to \$5816.38. A timely claim for refund, filed on March 12, 1948, in the amount of \$30,487.39, with interest in the amount of \$4877.98, was denied.

By this action, the plaintiff seeks to recover the amount of such claim under Internal Revenue Code, Sec. 3772. (1)

I.

The Corporate Entity Cannot Be Disregarded

We have to determine whether, as found by the

Commissioner, the transaction resulted in taxable income under Section 22 of the Internal Revenue Code (2), or whether, as claimed by the plaintiff, the cancellation of its debt by Socal was a gift or capital contribution to the plaintiff by its sole stockholder. (3)

We advert to the fact that the Agreement, upon which the transaction is bottomed, was not entered into by either corporation. It was an agreement between Sheedy and Gaines relating to the sale and acquisition of the Socal stock which Sheedy controlled in his individual capacity or as trustee. Neither corporation, as an entity, had any stock in the other. More particularly, the plaintiff did not own any of the Socal stock which was sold to Gaines. The debt, which was adjusted, was not Sheedy's, but the plaintiff's. Socal and not Sheedy cancelled the debt, and the benefit accrued to plaintiff and not to Sheedy.

These facts are of prime importance, because the entire argument of the plaintiff seems to be predicated upon the proposition that, as Sheedy owned and controlled both corporations, there was a fusion between the individual and the corporations, the corporations, as the cases say, "were shams", the distinction between them and Sheedy should be entirely obliterated and disregarded, and whatever the corporations did, should be attributed to Sheedy, who controlled them, and vice versa. On this assumption, the plaintiff insists that the transaction amounted to "a transfer of money from one pocket of Mr. Sheedy to another".

The difficulty with the argument is that a corporation and its stockholders are distinct entities. And the taxpayer who has chosen to use the corporate form for business purposes is not free to disregard it, in order to receive the tax benefit to which he might have been entitled as an individual. The reason is obvious. Having cloaked himself in corporate garb, he cannot shed the cloak at will, in order to claim tax benefits to which he is not entitled in his corporate capacity. Otherwise put, a person who has chosen whatever benefit comes from the corporate form, must be ready to accept both the tax advantages and disadvantages which flow from it. (4) In extraordinary circumstances, the corporate entity may be disregarded, especially when the corporation has no life of its own and is merely a limited instrument to achieve a single, definite object. But this will not be done in the ordinary circumstances, where the corporation has a distinct being, in order to give to it a tax benefit from a transaction in which it did not participate in its corporate capacity. And this is especially true when, as here, and regardless of sole ownership of its stock, the business actually had been carried on under the corporate form. As said by the Supreme Court:

“The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator’s personal

or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.” (5)

The distinction between Sheedy, the individual and controlling stockholder of the two corporations, and the corporate entities, is evident in the very contract from which the controversy stemmed. Change of liabilities was to follow the transfer of stock in Socal. After their assumption by the new directorate, there is, in the contract between Sheedy and Gaines, a distinct undertaking to save harmless not only Sheedy as an individual, but the plaintiff as well, “from any and all liability, claims or demands of whatsoever nature” which might arise from the various transfers including those “by reason of said compromise and settlement of said claim”. And, at the very time that Sheedy was selling his stock, he held a \$14,000.00 promissory note of Socal’s, payable to him. The Preamble to the contract recited that Socal was indebted to Sheedy in that sum, as evidenced by a promissory note dated March 3, 1944. By the Agreement, the note was transferred to Gaines, without recourse, its value was made a part of the consideration for the purchase of the stock, and Sheedy acknowledged receipt of its face value.

Can the transaction be considered a gift or a capital contribution?

II.

Gift or Contribution?

It is of the essence of any gift that there be no consideration. (6) And this principle applies to gifts by its stockholders to a corporation, whether they consist of the forgiveness of a debt or outright donations of things of value. If the problem of gifts between a stockholder and a corporation presents difficulties, they arise from the complexity of modern business methods and the variety of relationships into which stockholders and corporations may enter. But, whether the stockholder cancel a note or forgive a debt for services rendered or goods sold to the corporation, there must be a definite and gratuitous forgiveness by the stockholder of a definite debt which is owed to him by the corporation. (7) Where there is a reduction of a claim or its liquidation in an amount less than its face value, this principle does not apply. For, whether the adjustment be made through repurchase of an outstanding obligation for less than it cost or obligated the corporation or the satisfaction of an indebtedness for less than its value, we have the compromise of a claim and the gain resulting from it is income. (8)

III.

The Gain Was Taxable as Income

If the facts in the case be gauged by the principles just stated, it is abundantly clear that the transaction under consideration cannot be consid-

ered either a gift under Section 22(b)(3) of the Internal Revenue Code (9) or a capital contribution made gratuitously by a stockholder under the regulations. (10) As already appears, Socal was not a stockholder of the plaintiff. If any cancellation there was, it was by Socal and not by Sheedy. In truth, what we have here is not a gift or a gratuitous forgiveness, but a settlement of a claim for a less amount. The Agreement which preceded the actual cancellation and the entries made in the books and corporate records of the two corporations speak of the debt from the plaintiff to Socal not as a definite obligation, but an assertion of a claim. This indicates that the amount was not certain, that it was a matter of dispute between the two corporations. Gaines undertook to cause Socal to "compromise and settle" its claim against the plaintiff by the payment by the plaintiff of the sum of \$4000.00. As already appears, Gaines agreed to save not only Sheedy, but the plaintiff and its officers, stockholders and directors harmless from any and all liability, claims and demands which might arise or be asserted against it "by reason of said compromise and settlement of said claim". Both under general law and the law of California, the situation shows the assertion of a claim by Socal, which is disputed by the plaintiff, and a compromise of it,—a good illustration of an accord and satisfaction. (11) The actions of both corporations following the execution of the contract fit into the idea of compromise of a claim. Plaintiff cannot disclaim for

itself or Sheedy what Socal did after the Agreement was entered into, for the subsequent acts were necessary in order to protect the plaintiff and Sheedy and to give effect to the undertaking made by Gaines. The recital in Socal's Resolution accepting the four thousand dollars in payment of the debt and authorizing its President and Secretary to execute a general release merely carried out mutual promises of Sheedy and Gaines without which the Agreement would not have been made. The subsequent act of Socal in reporting this amount as a loss, which was allowed by the Commissioner, also fits into this pattern. They all spell clearly the compromise of a debt by the acceptance of a smaller sum.

In all cases of this character, the contemporaneous acts of the parties performed at the time when the effect of the transaction on tax liability was not uppermost in their minds should prevail over subsequent attempts to give to it a different interpretation. (12) If, as plaintiff contends, the effect of the transaction is as though the \$35,335.07 had been added to the price demanded by Sheedy for the transfer of the stock, and, after receiving it, Sheedy had donated it to the plaintiff, the answer is that the transaction was not handled in that manner. And neither Sheedy nor Gaines, contemporaneously, treated it as such. But even if we assume that this was the intention, their actions evidence a contrary intention. And, as between the

two, in a matter of this character, acts speak more eloquently to a court.

It follows that the Commissioner was right in his determination. Judgment will, therefore, be for the Defendant that the plaintiff take nothing by the Complaint.

Dated this 18th day of October, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Notes to Text

1. 26 U.S.C.A., Sec. 3773.
2. 26 U.S.C.A., Sec. 22(a).
3. 26 U.S.C.A., Sec. 22(b)(3). Regulation 111, Sec. 29.22(a)-13.
4. *Klein v. Board of Supervisors*, 1930, 282 U.S. 19, 24; *New Colonial Co. v. Helvering*, 1934, 292 U.S. 435, 442; *Burnett v. Commonwealth Improvement Co.*, 1932, 287 U.S. 415, 419-420; see, *National Carbide Corp. v. Commissioner*, 1949, 336 U.S. 422, 428-429.

“A taxpayer is free to adopt such organization for his affairs as he may choose and, having elected to do some business as a corporation, he must accept the tax disadvantages.

“On the other hand, the Government may not be required to acquiesce in the taxpayer’s election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the

challenged tax event is unreal or a sham, may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation. It is command of income and its benefits which marks the real owner of property." *Higgins v. Smith*, 1940, 308 U.S. 473, 477-478.

5. *Moline Properties v. Commissioner*, 1943, 319 U.S. 436, 438-439.

"The decisive question is whether the corporations were created to, or did, in fact, serve a recognizable business purpose." *O'Neill v. Commissioner*, 1948, C.A. 2, 170 F(2) 596, 598.

"If the corporate device is used for business advantages, there is no just ground for protests when it results in tax liability". *Railway Express Agency v. Commissioner*, 1948, C.A. 2, 169 F(2) 193, 196.

And see, *Rogan v. Starr Piano Co.*, 1943, C.A. 9, 139 F(2) 671, 674.

6. *Roberts v. Commissioner*, 1949, 176 F(2) 221, 223.

7. 1 Mertens, *Law of Federal Income Taxation*, 1942, Secs. 5.13-5.14; 2 Mertens, *op. cit.*, Secs. 11.19-11.21; *Douglass v. Willcuts*, 1935, 296 U.S. 1, 9; *Helvering v. American Dental Co.*, 1943, 318 U.S. 322; *American Cigar Co. v. Commissioner*, 1933, C.A. 2, 66 F(2) 425; *Commissioner v. Auto Strop Safety Razor Company*, 1934, C.A. 2, 74 F(2) 226; *Gibson v. Commissioner*, 1936, C.A. 3, 83 F(2) 869;

Carroll-McReary Co. v. Commissioner, 1941, C.A. 124 F(2) 303; Chenango Textile Corp. v. Commissioner, 1945, C.A. 2, 148 F(2) 296; George Hall Corp. v. Shaughnessy, 1946, D.C. N.Y., 67 F. Supp. 746. But even a stockholder's promise not to collect on a note may be taxable if the amount of the note is transferred to the capital of the corporation and made available for distribution to stockholders. Schweppe v. Commissioner, 1948, C.A. 9, 168 F(2) 284.

8. Mertens, *op. cit.*, Secs. 11.20-11.21; United States v. Kirby Lumber Co., 1931, 284, U.S. 1; Commissioner v. Jacobson, 1939, 336 U.S. 28; Central Paper Co. v. Commissioner, 1946, C.A. 6, 158 F(2) 131; Commissioner v. Pittsburg & West Virginia Ry. Co., 1949, C.A. 3, 172 F(2) 1010. The reasoning of these cases finds support in Walker v. Commissioner, 1937, C.A. 5, 88 F(2) 170; Helvering v. Jane Holding Co., 1940, C.A. 8, 109 F(2) 933, 940-941; Walsh Holyoke Steam Boiler Works v. Commissioner, 1947, 160 F(2) 185, 189.

9. 26 U.S.C.A., Sec. 22(b)(3).

10. Regulation 111, Sec. 29.22(a)-13.

11. 1 Am. Jur., Accord and Satisfaction, Secs. 1, 2, 13; 1 C.J.S., Accord and Satisfaction, Secs. 1, 6; Restatement, Contracts, Sec. 418; Fleming v. Post, 1944, C.A. 2, 146 F(2) 441, 443; California Civil Code, Secs. 1521, 1523; Sierra, *etc.*, Power Co. v. University, *etc.*, Co., 1925, 197 C. 376, 386-387;

Hurley v. Kazantzis, 1947, 82 C.A.(2) 378, 381;
Gibbons v. Brewster, 1947, 82 C.A.(2) 435, 441-442.
The Agreement having been fully executed, it was
irrevocable, even if it had not been in writing. See,
Julian v. Gold, 1931, 214 C. 74; Stoltenberg v. Har-
veston, 1934, 1 C(2) 264, 266.

12. Cf. Grace Bros. v. Commissioner, 1949, C.A.
9, 173 F(2) 70.

[Endorsed]: Filed October 18, 1949.

[Title of District Court and Cause.]

ORDER ON DECISION

The above-entitled cause, heretofore tried, argued
and submitted, is now decided as follows:

Upon the grounds stated in the Opinion filed
herewith, Judgment will be for the Defendant that
the Plaintiff take nothing by the Complaint.

Findings and Judgment to be prepared by Coun-
sel for the Defendant under Local Rule 7.

Dated this 18th day of October, 1949.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed October 18, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Action Came On for trial on September 27, 1949, at Los Angeles, California, before the court sitting without a jury, the Honorable Leon R. Yankwich presiding; the plaintiff appeared by his attorney, Melvin D. Wilson, and the defendant appeared by his attorneys, James M. Carter, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole, Robert D. Scott and James D. Pettus, Special Attorneys for the Bureau of Internal Revenue; briefs having been filed, a Stipulation of Facts was filed and testimony taken; thereafter on October 6, 1949, oral argument was heard, the plaintiff appearing by its attorneys Melvin D. Wilson and Frank Doherty, and defendant by his counsel; and the Court having considered the evidence and the arguments of counsel, makes the following:

Findings of Fact

I.

The facts stipulated by the parties on September 27, 1949, are hereby found and adopted by the Court as true.

II.

Plaintiff was solvent and had a clear net worth

both before and after November 20, 1944, on which date Socal Foundry's directors by a corporate resolution authorized settlement of plaintiff's debt of \$39,335.07 for \$4,000 to be paid by the plaintiff.

III.

The transaction between plaintiff and Socal Foundry which took place on November 20, 1944, was effected with the purpose of compromising the debt owed by plaintiff to Socal Foundry for less than Socal Foundry was entitled to receive; Socal Foundry had no intention of gratuitously forgiving such debt or any part of it.

IV.

The \$4,000 paid Socal Foundry by plaintiff was intended to be in satisfaction of an accord between plaintiff and Socal Foundry with respect to the debt of \$39,335.07 owed Socal Foundry by plaintiff.

V.

Socal Foundry was not a stockholder of plaintiff at the time Socal Foundry accepted \$4,000 from the plaintiff in payment of a debt in the amount of \$39,335.07.

From the foregoing Findings of Fact, the Court reaches the following:

Conclusions of Law

I.

Plaintiff in settling its indebtedness to Socal Foundry in the amount of \$39,335.07 by a payment on November 20, 1944, in the amount of \$4,000, real-

ized income under Section 22(a) of the Internal Revenue Code during the taxable year of 1944 in the amount of \$35,335.07.

II.

Said income of \$35,335.07 is not includible in plaintiff's equity invested capital during the taxable year 1944 under the provisions of Section 718 of the Internal Revenue Code.

III.

Plaintiff did not overpay its excess profits tax liability for the taxable year 1944.

IV.

Plaintiff is not entitled to recover from the defendant any part of the Federal excess profits taxes paid by it to the defendant for the taxable year 1944, nor to recover judgment against the defendant on account of said payment.

V.

That the defendant is entitled to have judgment from the plaintiff for his costs herein to be taxed by the Clerk of this Court.

Dated: This 31st day of October, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Approved as to Form:

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

[Endorsed]: Filed October 31, 1949.

In the United States District Court, Southern
District of California, Central Division
No. 8685-Y

PACIFIC MAGNESIUM, INC. (formerly Socal
Magnesium, Inc.),

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
Collection District of California,

Defendant.

JUDGMENT

This Action Came On for trial on September 27, 1949, at Los Angeles, California, before the court sitting without a jury, the Honorable Leon R. Yankwich presiding; the plaintiff appeared by his attorney Melvin D. Wilson, and the defendant appeared by his attorneys James M. Carter, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole, Robert D. Scott and James D. Pettus, Special Attorneys for the Bureau of Internal Revenue; briefs having been filed, a Stipulation of Facts was filed and testimony taken; thereafter on October 6, 1949, oral argument was heard, the plaintiff appearing by its attorneys Melvin D. Wilson and Frank Doherty, and defendant by his counsel; and

the Court having made its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed:

That the plaintiff take nothing by this action and that the defendant have and recover judgment from the plaintiff for its costs taxed by the Clerk of this Court in the sum of \$.

Dated: This 31st day of October, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Approved as to Form:

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

[Endorsed]: Filed and entered October 31, 1949.

[Title of District Court and Cause.]

CONDENSATION OF THE TESTIMONY
OF RALPH D. SWEENEY

RALPH D. SWEENEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

My name is Ralph D. Sweeney. I am an Attorney at Law. My address is 842 Title Insurance Building, 433 South Spring Street, Los Angeles, California.

I knew P. H. Sheedy in his lifetime. I acted as

his attorney for certain things. I was his attorney on November 20, 1944.

I was attorney for a corporation called Socal Foundry on November 20, 1944. I was also a director of that company at that time.

I was attorney on November 20, 1944, for Pacific Magnesium, Inc., then called Socal Magnesium, Inc.

I prepared the contract which is Exhibit No. 1 of the Stipulation filed in this case. Before preparing that contract I discussed with Mr. Sheedy the matter of his entering into the contract with Mr. Frank Gaines so that I am familiar with the provisions in the agreement that Mr. Gaines would cause Socal Foundry to forgive the debt of \$39,335.07 owing by Pacific Magnesium, Inc., to Socal Foundry, for the amount of \$4,000.00.

Q. Did Mr. Sheedy state to you his motive or purpose or object in that provision?

A. Yes, he did.

Q. And what did he say?

Mr. Scott (Attorney for the Defendant): If the Court please, I would like to urge an objection to that question. Our position is that the specific intent, which is material here, is the intent of Socal Foundry that was the creditor and what their intentions were in cancelling the indebtedness is material, but the intent of Mr. Sheedy was not.

The Court: Objection overruled.

The Witness: In order to answer that question, I have to give a little of the background.

Mr. Wilson: Go ahead.

The Court: That would be better. It is preferable.

Ralph D. Sweeney then testified that P. H. Sheedy had formed the corporation known as Socal Foundry and had also formed the corporation known as Socal Magnesium (now Pacific Magnesium, Inc.). Socal Foundry made aluminum castings and Socal Magnesium made magnesium castings. Mr. Sheedy was ill. He wished to dispose of his stock in Socal Foundry but wished to retain his stock in Socal Magnesium.

Mr. Frank Gaines had been a former employee of Socal Foundry and Socal Magnesium, but on November 20, 1944, was no longer employed by either company.

Mr. Sheedy and Mr. Gaines carried on negotiations toward the purchase of Mr. Sheedy's stock in Socal Foundry. Mr. Gaines had only so much cash which, according to my recollection was \$56,000.00.

Socal Foundry owed Mr. Sheedy \$14,000.00 and had executed a promissory note payable to Mr. Sheedy for that amount, which Mr. Gaines purchased in the transaction, and also Mr. Gaines paid Mr. Sheedy \$42,000.00 in cash, the consideration being that all of the stock of Socal Foundry would be transferred by Mr. Sheedy to Mr. Gaines. Socal Magnesium owed Socal Foundry approximately \$40,000.00 and Mr. Sheedy told me that he did not wish to transfer all of his stock holdings in Socal Foundry to Mr. Gaines and then have Mr. Gaines sue Socal Magnesium for the \$40,000.00 it owed and

thereby Mr. Sheedy would probably lose Socal Magnesium or would be obliged to pay more money into Socal Magnesium. Therefore, part of the transaction of November 20, 1944, was that the debt owing by Socal Magnesium to Socal Foundry would be released for the payment of \$4,000.00 by Socal Magnesium to Socal Foundry, and that is what happened.

Q. (By Mr. Wilson): What reason did either Mr. Sheedy, as sole stockholder and president of Socal Foundry, or Mr. Gaines, as president and sole stockholder of Socal Foundry, state motivated Socal Foundry in forgiving this debt?

A. Well, in the conversation that we had in which Mr. Gaines, Mr. Sheedy and I were present, which was sometime in November of 1944, preliminary to the contract, Mr. Sheedy stated that he would not sell his stock to Mr. Gaines unless the \$40,000.00, approximate amount of money owing by Magnesium to Foundry was cancelled for \$4,000.00, because he did not wish a suit brought by Socal Foundry against Socal Magnesium for the \$40,000.00, nor did he wish to loan Socal Magnesium \$40,000.00 with which to pay off Socal Foundry, and he stated that he would not sell his stock to Mr. Gaines unless he got a considerably greater amount than the cash consideration of \$42,000.00; and part of the consideration was to be the cancellation of this \$35,335.07 debt.

Q. Did that motive or purpose transmute itself to Socal Foundry?

A. It did. If I may again give you the surrounding circumstances, I believe it was the morning that the contract was signed that the consideration passed. There were two meetings of the directors of Socal Foundry. I was a director. At the first meeting, Mr. Sheedy and other directors resigned as directors and officers, Mr. Gaines and Mr. Barker were elected directors and officers to take their places. Immediately following this meeting, another meeting was had of Socal Foundry in which I, Mr. Barker and Mr. Gaines, the sole directors, participated and in which we passed a resolution to carry out the agreement of Mr. Sheedy and Mr. Gaines.

Q. The resolution to cancel the debt was then caused by the contract, was it?

A. That is correct. It is all part of the one transaction.

Examination by the Court

In response to questions by the court Mr. Sweeney testified that prior to the sale of the stock of Socal Foundry by Sheedy to Gaines, there had been no thought of having Socal Foundry forgive or cancel part of the debt owing to it from Pacific Magnesium. The matter of the forgiveness arose solely in order to facilitate the sale of Socal Foundry stock.

Cross-Examination

Mr. Gaines and Mr. Sheedy were discussing the purchase and sale of the stock of Socal Foundry perhaps two or three weeks before November 20, 1944. There were not many offers or counteroffers

as Mr. Gaines had only so much cash and the deal resolved itself around how to put that cash to work.

The transaction that was finally concluded was discussed at two conferences prior to the execution of the agreement.

Received Copy of the above and foregoing Condensation of the Testimony of Ralph D. Sweeney.

/s/ JAMES D. PETTUS.

Attorney for Defendant.

Dated November 30, 1949.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Pacific Magnesium, Inc. (formerly Socal Magnesium, Inc.), plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 31, 1949.

/s/ MELVIN D. WILSON,

Attorney for Appellant,

Pacific Magnesium, Inc.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

CONDITIONS OF CASH BOND

State of California,
County of Los Angeles—ss.

Melvin D. Wilson, being duly sworn deposes and says:

That he is the attorney for the plaintiff, Pacific Magnesium, Inc. in the above entitled matter.

That the cash bond of Two Hundred Fifty (\$250.00) Dollars deposited herewith is the property of the plaintiff, Pacific Magnesium, Inc. That said cash bond of Two Hundred Fifty (\$250.00) Dollars is deposited herewith as required by law and the rules of the court, and is subject to the provisions of the local rule 8-C of the District Court of the United States for the Southern District of California, Central Division.

In other words if the plaintiff does not in this case pay the costs on appeal as provided by law, then the court or the clerk hereof may in accordance with the provisions of local rule 8-C proceed against the plaintiff and said cash bond in accordance with their obligation and may ward execution thereon.

On the other hand, if the plaintiff pays the cost of the appeal, then said cash bond is to be returned to the plaintiff, also in accordance with the rules of the court.

/s/ MELVIN D. WILSON.

Subscribed and sworn to before me this 30th day of November, 1949.

[Seal] /s/ GRACE M. WHEELER,
Notary Public in and for Said County and State.
My Commission Expires July 15, 1952.

The above cash bond has been examined and is recommended for approval as provided in Rule 8.

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON

Now comes the plaintiff in the above entitled case and files the following Statement of Points to be relied upon in the appeal of the above entitled case from the final judgment made by this Honorable Court on the 31st of October, 1949.

1. The Court erred in failing to find that Socal Foundry intended to and did make a gift to plaintiff of \$35,335.07 on November 20, 1944, by settling the claim of \$39,335.07 of Socal Foundry against plaintiff for \$4,000.00

2. The Court erred in failing to find that P. H. Sheedy, plaintiff's sole stockholder, made a contribution to plaintiff's capital of \$35,335.07 on November 20, 1944, by causing the creditor, Socal Foundry,

to settle plaintiff's debt of \$39,335.07 for \$4,000.00.

3. The Court erred in finding that plaintiff realized \$35,335.07 taxable income out of the transaction of November 20, 1944, wherein its debt of \$35,335.07 was forgiven.

4. The Court erred in rendering judgment for defendant on the facts found.

Wherefore, the plaintiff prays that said decree be reversed and that the United States District Court for the Southern District of California, Central Division, be ordered to enter a decree reversing the decision in said cause.

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

Received Copy of the above and foregoing Statement of Points Relied On.

Dated November 30, 1949.

/s/ JAMES D. PETTUS,
Attorney for Defendant.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS
OF RECORD ON APPEAL

To The Clerk of The United States District Court
in and for the Southern District of California,
Central Division:

Please issue a certified transcript of record in the
above entitled case on appeal to the Circuit Court
of Appeals for the Ninth Circuit, consisting of the
following:

1. Complaint.
2. Answer to Complaint.
3. Stipulation of Facts and exhibits attached
thereto or made a part thereof.
4. Copy of Claim for Refund.
5. Condensation of the Oral Testimony given at
the trial.
6. Opinion of United States District Judge Leon
R. Yankwich.
7. Special Findings as allowed by the Court.
8. The Judgment.
9. Petition for Appeal.
10. Cost Bond.
11. This Designation of Portions of Record on
Appeal.

12. Statement of Points relied on by appellant.
/s/ MELVIN D. WILSON.

To Ernest A. Tolin, United States Attorney; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys, Eugene Harpole, Robert D. Scott and James B. Pettus, Special Attorneys, Bureau of Internal Revenue:

Please take notice that the foregoing Designation of Contents of Record on Appeal is being filed fore-with in the above entitled case.

/s/ MELVIN D. WILSON,
Counsel for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 30, 1949.

PLAINTIFF'S EXHIBIT No. 1

In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 8685Y

PACIFIC MAGNESIUM, INC., (formerly Socal
Magnesium, Inc.),

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as Col-
lector of Internal Revenue for the Sixth Dis-
trict of California.

Defendant.

STIPULATION

The above-entitled parties through their respec-

Plaintiff's Exhibit No. 1—(Continued)

tive counsel hereby stipulate that the above-entitled cause may be tried upon the following stipulation of facts together with other evidence which may be introduced at the trial not contradictory hereto.

1. On November 14, 1947, plaintiff paid to defendant, the Collector of Internal Revenue for the Sixth District of California, the Thirty-six Thousand Three Hundred Fifty-two and 39/100 Dollars (\$36,352.39) demanded by the Commissioner of Internal Revenue as additional excess profits tax for the calendar year 1944, together with interest thereon from March 15, 1945, to November 14, 1947, at six per cent (6%) per annum amounting to Five Thousand Eight Hundred Sixteen and 38/100 Dollars (\$5,816.38).

2. Plaintiff's claim for refund of excess profits tax for 1944 has not been assigned by plaintiff to anyone and is now the property of plaintiff.

3. Plaintiff had capital stock outstanding as of November 20, 1944, of a par value of Thirty-five Thousand Five Hundred Dollars (\$35,500.00), being Three Thousand Five Hundred Fifty (3,550) shares, each of the value of \$10.00. As of November 20, 1944, the stock of plaintiff was held as follows: P. H. Sheedy, Certificate No. 1 for Sixteen Hundred (1600) shares; P. H. Sheedy, Trustee, Certificate No. 5 for Four Hundred (400) shares; Pearless Pattern Company, Inc., Certificate No. 8 for One Thou-

Plaintiff's Exhibit No. 1—(Continued)

sand Two Hundred Fifty (1,250) shares; P. H. Sheedy, Certificate No. 9 for Three Hundred (300) shares; total, Three Thousand Five Hundred Fifty (3,550) shares. As of November 20, 1944, P. H. Sheedy was the sole beneficiary under the trust mentioned above and was the sole stockholder of Pearless Pattern Company, Inc. On February 28, 1945, P. H. Sheedy as Trustee, transferred the Four Hundred (400) shares of stock to P. H. Sheedy and on March 14, 1947, Pearless Pattern Company, Inc. transferred the One Thousand Two Hundred Fifty (1,250) shares to P. H. Sheedy.

4. Socal Foundry was organized under the laws of California and on November 20, 1944, had issued and outstanding Three Thousand (3,000) shares of capital stock, all of which was no par value. P. H. Sheedy individually owned Twenty-two Hundred Eighty-nine and $\frac{1}{3}$ ($2289\frac{1}{3}$) shares of said stock and as trustee owned Seven Hundred Ten and $\frac{2}{3}$ ($710\frac{2}{3}$) shares of said stock. He was the beneficiary of said trust.

5. P. H. Sheedy was president and a director of plaintiff throughout 1944. P. H. Sheedy was, until he sold the stock of Socal Foundry to Mr. Frank Gaines, the president and director of Socal Foundry.

6. Mr. Frank Gaines had prior to June 1944 been an officer, director and general manager of Socal Foundry and of plaintiff. At the time of the execution of the agreement (Exhibit 1) on November 20,

Plaintiff's Exhibit No. 1—(Continued)

1944, Frank Gaines was neither an officer nor director of plaintiff or Socal Foundry. Upon the execution of the agreement referred to herein as Exhibit 1, Mr. Gaines and his nominees, were on November 20, 1944, elected directors and officers of Socal Foundry in place of P. H. Sheedy and his nominees and thereafter adopted the resolution set out in Exhibit 3 hereof.

7. As of November 20, 1944, plaintiff owed Socal Foundry Thirty-nine Thousand Three Hundred Thirty-five and 7/100 (\$39,335.07) Dollars on open account, said amount being the balance on account of numerous transactions which occurred in 1943 and 1944 wherein Socal Foundry supplied to plaintiff supplies, services and equipment. In addition plaintiff owed Socal Foundry other sums which were not settled between them on November 20, 1944; said sums being referred to in the agreement dated November 20, 1944, between P. H. Sheedy and Frank Gaines, a copy of which agreement is attached hereto and marked Exhibit 1.

On November 20, 1944, P. H. Sheedy and Frank Gaines entered into a contract, a copy of which is attached hereto and marked Exhibit 1. The terms of this contract were completely carried out in 1944. The tools, machinery and equipment which Socal Foundry sold to plaintiff on November 20, 1944, for Two Thousand Dollars (\$2,000.00) were worth Two Thousand Dollars (\$2,000.00) as of that date.

Plaintiff's Exhibit No. 1—(Continued)

8. Attached hereto and marked Exhibit 2 is a statement showing balance sheets of plaintiff as of December 31, 1943, and December 31, 1944, as shown in the Revenue Agent's report and balance sheets of plaintiff as of October 31, 1944, and December 31, 1944, per its books. It is agreed that plaintiff does not by stipulating into evidence Exhibit 2, concede that the cancellation of the debt by Socal Foundry, in the amount of Thirty-five Thousand Three Hundred Thirty-five and 7/100 Dollars (\$35,335.07) amounted to taxable income to plaintiff, and that the defendant does not by introducing to evidence Exhibit 2 concede that plaintiff did not realize taxable income on account of the forgiveness by Socal Foundry of plaintiff's indebtedness.

9. It is agreed that the plaintiff, on its books, credited the forgiveness of indebtedness in the amount of Thirty-five Thousand Three Hundred Thirty-five and 7/100 Dollars (\$35,335.07) to "Capital Surplus," and debited the amount of Thirty-five Thousand Three Hundred Thirty-five and 7/100 Dollars (\$35,335.07) to "Accounts Payable, Socal Foundry."

10. It is stipulated that both Socal Foundry and plaintiff kept their books and filed their income and excess profits tax returns on the accrual basis.

11. Attached hereto and marked Exhibit 3 is a copy of the Minutes of the Meeting of the Board of Directors of Socal Foundry held November 20, 1944,

Plaintiff's Exhibit No. 1—(Continued)

attended by Directors, Gaines, Barker and Sweeney, after the execution of the agreement marked Exhibit 1.

12. Attached hereto and marked Exhibits 4 and 5 are photostatic copies of Income and Excess Profits Tax Returns of plaintiff. It is stipulated that the penciled notes appearing on said returns are to be ignored.

13. It is stipulated that Socal Foundry deducted, on its 1944 Federal income and excess profits tax returns, a loss of Thirty Five Thousand Three Hundred Thirty-five and 07/100 Dollars (\$35,335.07) on account of the cancellation of the debt owing from plaintiff, and such deduction was allowed by the Commissioner of Internal Revenue, through his Revenue agents. It is further stipulated that Socal Foundry had a loss for 1944, after the allowance of net operating loss carry-backs, as permitted under the provisions of Section 23 (t) and 122 of the Internal Revenue Code, but before the allowance of said Thirty-Five Thousand Three Hundred Thirty-five and 07/100 Dollars (\$35,335.07) deduction, so that Socal Foundry obtained no tax benefit by reason of such Thirty-Five Thousand Three Hundred Thirty-five and 07/100 Dollar (\$35,335.07) deduction.

14. It is stipulated and agreed that after the court announces its decision on the merits, the par-

Plaintiff's Exhibit No. 1—(Continued)
ties will present computations of the tax and if there is any difference between them, it will be settled by the court.

Dated this 7th day of September, 1949.

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT and
JAMES B. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ ROBERT D. SCOTT,
Attorneys for Defendant.

Exhibit 1
(Copy)

Agreement

This Agreement made and entered into this 20th day of November, 1944, by and between

P. H. Sheedy, hereinafter referred to as "Mr.

Plaintiff's Exhibit No. 1—(Continued)

Sheedy" and Frank Gaines, hereinafter referred to as "Mr. Gaines"

Witnesseth:

Whereas, Socal Foundry is a California corporation and has issued and outstanding three thousand (3000) shares of its capital stock all of which is of no par value, twenty-two hundred eighty-nine and one-third ($2289\frac{1}{3}$) shares of which are owned by Mr Sheedy individually and seven hundred ten and two-thirds ($710\frac{2}{3}$) shares of which are owned by Mr. Sheedy as Trustee; and

Whereas, Mr. Sheedy either individually or as Trustee owns all of the issued and outstanding capital stock of Socal Magnesium Inc., a California corporation; and

Whereas, Mr. Gaines has been an officer, director and general manager of said Socal Foundry; and

Whereas, Socal Foundry is indebted to Mr. Sheedy in the sum of Fourteen Thousand Dollars (\$14,000.00) as evidenced by that certain promissory note of Socal Foundry payable to Mr. Sheedy dated March 3, 1944; and

Whereas, Mr. Gaines has been an officer and director of Socal Magnesium Inc. and during his term of office he caused Socal Magnesium Inc. to employ one A. V. Trotter at a monthly salary of One Thousand Dollars (\$1000.00) for a period of one year commencing September 1, 1943 and ending August 31, 1944, under a written employment agreement; and

Whereas, Mr. Gaines as an officer of Socal Mag-

Plaintiff's Exhibit No. 1—(Continued)

nesium Inc. discharged said A. V. Trotter before the termination of his contract of employment and by reason thereof said A. V. Trotter is threatening to sue said Socal Magnesium Inc.; and

Whereas, Socal Foundry claims that Socal Magnesium Inc. is indebted to it in the approximate amount of Thirty-nine Thousand Three Hundred Thirty-five and 07/100ths Dollars (\$39,335.07), not including the amount due Socal Foundry by reason of subcontracting work done by Socal Foundry for Socal Magnesium Inc. herein referred to as the Permanent Mold Account in the approximate sum of Six Thousand Six Hundred Ninety and 48/100ths Dollars (\$6690.48) and not including the amount due Socal Foundry by Socal Magnesium Inc. known as Inventory of Metal Account, in the approximate amount of Nine Hundred Four and 40/100ths Dollars (\$904.40).

Now Therefore, It Is Hereby Agreed By And Between The Parties Hereto As Follows:

1. In consideration of the covenants and agreements on the part of Mr. Gaines to be performed and of the terms, covenants and conditions herein set forth, Mr. Sheedy agrees to sell, assign, transfer and set over, without recourse, to Mr. Gaines, the aforesaid promissory note dated March 3, 1944 and executed by Socal Foundry for the sum of Fourteen Thousand Dollars (\$14,000.00), and the aforesaid three thousand (3000) shares of the capital stock of Socal Foundry for the sum of Forty-two Thousand Dollars (\$42,000.00), and in consideration

Plaintiff's Exhibit No. 1—(Continued)

therefor Mr. Gaines covenants and agrees as follows:

(a) To pay to Mr. Sheedy the said sum of Fourteen Thousand Dollars (\$14,000.00) for said promissory note, receipt of which is hereby acknowledged by Mr. Sheedy, and

(b) To pay to Mr. Sheedy the sum of Forty-two Thousand Dollars (\$42,000.), receipt of which is hereby acknowledged by Mr. Sheedy, and

(c) To immediately cause said Socal Foundry to sell to said Socal Magnesium Inc. certain tools, machinery and equipment for the sum of Two Thousand Dollars (\$2000.00) which are now owned by Socal Foundry but are in possession of Socal Magnesium Inc. and to personally warrant, guarantee and defend the title of Socal Magnesium Inc. thereto against the claims and demands of all persons whomsoever by reason of said sale, and

(d) To cause said Socal Foundry to compromise and settle its claim against Socal Magnesium Inc. in the aforesaid amount of Thirty-nine Thousand Three Hundred Thirty-five and 07/100ths Dollars (\$39,335.07) by payment by Socal Magnesium Inc. to Socal Foundry of the sum of Four Thousand Dollars (\$4,000.00), and Mr. Gaines personally agrees that he will save and hold Mr. Sheedy and Socal Magnesium Inc., its officers, stockholders and directors wholly and completely harmless from any and all liability, claims or demands of whatsoever nature arising from or which may accrue to or be asserted against Socal Magnesium Inc. by reason

Plaintiff's Exhibit No. 1—(Continued)
of said compromise and settlement of said claim;
and

(e) To save and hold Mr. Sheedy and Socal Magnesium Inc. wholly and completely harmless from any and all liability, claims or demands of whatsoever nature arising from or which may accrue to or be asserted against Socal Magnesium Inc. or Mr. Sheedy by said A. V. Trotter.

(f) To save and hold Mr. Sheedy wholly and completely harmless from any and all liability, claims or demands of whatsoever nature, suit or suits, cause or causes of action, which may be liabilities of Socal Foundry, or which may accrue to or be asserted against said Socal Foundry, or against Mr. Sheedy by reason of his stock ownership therein, by any person, firm, corporation, United States Government, or any political subdivision thereof.

2. Mr. Gaines acknowledges that he has been given full opportunity to inspect the books and records of Socal Foundry and that no warranties or representations, expressed or implied, of any kind or nature have been made by Mr. Sheedy, or any one in his behalf, concerning the liability, debts and claims of and against said Socal Foundry or concerning any of its assets, and that Mr. Sheedy does not make any warranties, guarantees or representations as to the accuracy of the books and records of Socal Foundry or that there are any outstanding claims contingent or otherwise that may be asserted

Plaintiff's Exhibit No. 1—(Continued)

against said Socal Foundry and which are not reflected on the books of said corporation, and Mr. Gaines hereby releases and forever discharges Mr. Sheedy, his heirs, executor and administrator from all claims and demands of whatsoever nature in law or in equity which against Mr. Sheedy, his heirs, executor and administrator and each of them, Mr. Gaines ever had, now has, or hereafter can or may have by reason of any dealings or transactions of any kind or nature including this transaction.

3. In connection with the agreements herein contained of Mr. Gaines to hold Mr. Sheedy wholly and completely harmless from the liabilities set forth herein, Mr. Gaines agrees that he will defend or cause to be defended any and all litigation which may arise or hereafter be asserted against Socal Magnesium, Inc., or against Mr. Sheedy, his heirs, executor and administrator arising out of any of the matters hereinbefore set forth, and that he will make defense to such litigation and all of the same through such counsel as he may select and who may be satisfactory to Mr. Sheedy, his heirs, executor and administrator. Mr. Gaines hereby further agrees that in the event of any failure on his part so to defend any and all such litigation that he will save and hold Socal Magnesium, Inc., and Mr. Sheedy, his heirs, administrator and executor, wholly and completely harmless from any and all liability which Socal Magnesium, Inc., and/or Mr. Sheedy, his heirs, executor and administrator, and each of them, may incur for attorneys fees, costs

Plaintiff's Exhibit No. 1—(Continued)

and/or expenses of any kind in defense of any such litigation or matters. Nothing in this paragraph 3 contained shall be construed to limit the liability of Mr. Gaines from saving and holding Mr. Sheedy and Socal Magnesium, Inc., wholly and completely harmless from liability arising out of any of the matters hereinabove set forth.

4. Any covenants, agreements and guarantees herein contained on the part of Mr. Gaines shall be deemed and construed to be continuing covenants, agreements and guarantees that shall survive the delivery of said shares of stock and said note.

5. Mr. Sheedy agrees that he will resign as an officer and director of Socal Foundry when requested by Mr. Gaines to do so, and it is agreed that Mr. Sheedy shall receive his usual salary from Socal Foundry up to the time of his resignation.

6. Notwithstanding anything to the contrary herein contained, it is expressly agreed and understood that Mr. Gaines is not responsible or liable for the payment of any state or federal income taxes or any taxes of whatsoever nature that may be asserted against or claimed to be due from Mr. Sheedy or Socal Magnesium, Inc., by reason of any transaction, matter, cause or thing herein set forth, or otherwise, nor shall Mr. Gaines be obligated to defend any suit or claim arising from such asserted tax liability; provided, however, that the provisions of this paragraph 6 shall in no wise pertain to income, franchise, excess profit, or other taxes of

Plaintiff's Exhibit No. 1—(Continued)

any kind or nature which may be due by or be asserted against Socal Foundry by any taxing authority, which tax liabilities are those of Socal Foundry and not of Mr. Sheedy.

7. It is further agreed and understood that this agreement is binding upon and shall inure to the benefit of the parties hereto, their heirs, executors, administrators and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ P. H. SHEEDY,

/s/ FRANK GAINES.

Plaintiff's Exhibit No. 1—(Continued)

EXHIBIT 2

Pacific Magnesium, Inc.

Balance Sheets

	Per Revenue Agent		Per Books	Per Books
	12-31-43	12-31-44	10-31-44	12-31-44
Cash	2,117.26	22,871.66	18,278.01	22,871.66
Accts. Receivable	4,132.77	60,290.42	57,918.80	60,290.42
Inventories	7,130.63	17,638.87	10,306.97	17,638.87
Depreciable Assets—				
net	19,642.18	21,824.67	17,216.04	20,153.03
Deposits	1,850.00	1,854.00	1,854.00	
Deferred Charges	6,869.28	4,896.90	4,606.04	6,750.90
Total	<u>\$41,742.12</u>	<u>\$129,376.52</u>	<u>\$110,179.86</u>	<u>\$127,704.88</u>
Accts. Payable	56,750.60	30,857.85	31,770.56	30,857.85
Accrued Wages	1,374.33	6,956.28	6,189.33	6,956.28
Accrued Capital				
stock tax	750.00	1,375.00		
Social Security and				
Withholding Tax	4,572.93	5,951.78	3,508.34	7,122.08
Accrued Income Tax....		39,775.32		
Accrued Compensation				
Insurance		1,170.30	408.91	
Capital Stock	20,000.00	35,500.00	35,500.00	35,500.00
Southern California				
Foundry			39,335.07	
Capital Surplus				35,335.07
Surplus	(41,704.74)	7,789.99	(6,532.35)	11,933.60
Total	<u>\$41,742.12</u>	<u>\$129,376.52</u>	<u>\$110,179.86</u>	<u>\$127,704.88</u>

Plaintiff's Exhibit No. 1—(Continued)

Exhibit 3

“Whereas Socal Magnesium Inc., a California corporation, is indebted to this corporation in the approximate sum of \$39,355.07, not including the amount due by said Socal Magnesium Inc. to this corporation on its Permanent Mold Account or Inventory of Metal Account, and

“Whereas it is the belief of the directors of this corporation that said Socal Magnesium Inc. is unable to pay its said debt and that if this corporation can obtain the sum of \$4000.00 from said Socal Magnesium Inc. in settlement of said debt, that it would be a wise and proper thing to do.

“Now, Therefore, Be It Resolved that this corporation accept from Socal Magnesium Inc. the sum of \$4000.00 as payment in full of all monies and other things of value that may be due and owing to this corporation from Socal Magnesium Inc., except that this does not pertain to the account known as Permanent Mold Account and the account known as Inventory of Metal Account now owing to this corporation as aforesaid.

“Resolved Further that the President and Secretary of this corporation be and they are hereby authorized and directed to execute a General Release in the name of and for and on behalf of this corporation, and to affix the corporate seal thereto, releasing said Socal Magnesium Inc. from the payment of any monies owing to this corporation, except as aforesaid, in consideration of the payment of \$4000.00 by Socal Magnesium Inc. to this corporation.”

Plaintiff's Exhibit No. 1—(Continued)

Pacific Magnesium, Inc.

1823 East Washington Blvd.

Los Angeles 21

March 14, 1945

So-Cal Foundry, a California corporation, had on November 20, 1944 issued and outstanding 3000 shares of its capital stock, all of which was of no par value but of a stated value of \$12.00 per share, 2289 $\frac{1}{3}$ shares of which were owned by P. H. Sheedy individually and 710 $\frac{2}{3}$ shares of which stood in the name of P. H. Sheedy as Trustee.

Pacific Magnesium, Inc. (formerly So-Cal Magnesium, Inc.) is a California corporation which on November 20, 1944 had issued and outstanding 3550 of its shares of no par stock which had a stated value of \$10.00 per share. P. H. Sheedy owned 1900 shares, P. H. Sheedy as Trustee owned 400 shares and Peerless Pattern Co., Inc. owned 1250 shares.

So-Cal Foundry on November 20, 1944 claimed that Pacific Magnesium, Inc. was indebted to it in the amount of \$39,335.07.

On November 20, 1944 Frank E. Gaines purchased from Mr. Sheedy individually and as trustee all of the aforesaid outstanding stock of said So-Cal Foundry and on said day So-Cal Foundry, in order to compromise and settle its said claim against Pacific Magnesium, Inc. in the aforesaid amount of \$39,335.07 accepted from Pacific Magnesium, Inc. and Pacific Magnesium, Inc. paid to So-Cal Foundry the sum of \$4000.00 as satisfaction and payment in full of said claim.

Plaintiff's Exhibit No. 1—(Continued)

At the beginning of the calendar year 1944 Pacific Magnesium, Inc. was insolvent in that its liabilities exceeded its assets, and at the time of the satisfaction of said debt Pacific Magnesium, Inc. was in financial straits and was not in position to pay its debts in full.

[In pencil] So-Cal Foundry claimed a Loss from Bad Debts in the amount of \$35,335.07, due to the above compromise, on its 1944 return which was allowed.

Frank E. Gaines was the sole stock holder of the So-Cal Foundry on 11-20-44, date of compromise.

Schedule A—Other Costs
So-Cal Magnesium, Inc., Los Angeles, Calif.
Year 1944

Foundry Expenses

Small Tools	\$ 1,604.24
Supplies	47,719.59
Compensation, Liability, Fire Insurance.....	7,178.40
Gas, Heat, Water & Power.....	7,259.02
Finished Castings Purchased	1,594.39
Outside Production	17,736.38
*Miscellaneous	13,257.08
	<hr/>
	\$96,349.10

* Production Expenses: X Rays, Tests, Chem. Analysis, Patterns, Sand Blasting, Pickling, etc.

Schedule D—Loss From Sale of Property
So-Cal Magnesium, Inc., Los Angeles, Calif.
Year 1944

Loss on Sale of Two Squeezers:

Cost	\$333.13
Less: Sale Price	200.00
	<hr/>
	\$133.13
Less: Accrued Depreciation	27.75
	<hr/>
Loss	\$105.38

Plaintiff's Exhibit No. 1—(Continued)

Schedule J—Loss by Fire
 So-Cal Magnesium, Inc., Los Angeles, Calif.
 Year 1944

Cost of Repairs and Replacements to	
Heat Treat Oven.....	\$6,865.75
Less: Payment by Insurance Companies.....	6,023.91
	<hr/>
Loss	\$841.84
	<hr/> <hr/>

Explanation of Net Operating Loss Deduction
 So-Cal Magnesium, Inc., Los Angeles, Calif.
 Year 1944

Loss for Fractional Part of Year 1943, Per Return Filed	
Sales	\$19,885.31
Less: Cost of Sales.....	34,215.61
	<hr/>
Gross Loss	\$14,330.30
Compensation of Officers	9,900.00
Salaries & Wages	7,543.66
Rent	2,220.00
Repairs	1,772.09
Taxes	1,490.27
Depreciation	1,919.57
Other Deductions	1,779.85
	<hr/>
Loss Per Tax Return.....	\$40,955.74
	<hr/> <hr/>

Schedule K—Other Deductions
 So-Cal Magnesium, Inc., Los Angeles, Calif.
 Year 1944

Advertising	\$ 1,112.05
Automobile	800.02
Salesmen's Expenses	2,363.31
Compensation Insurance	48.76
Stationery, Supplies & Postage	1,866.26
Office Expense	40.49
Telegraph & Telephone	1,393.31
Dues & Subscriptions	33.00
Professional Services	1,911.54
Miscellaneous	899.94
	<hr/>
	\$10,468.68
	<hr/> <hr/>

DEFENDANT'S EXHIBIT A

United States of America
Treasury Department
Washington

May 12, 1949.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of \$30,487.39 plus interest, Excess Profits Tax for 1944, (with statement and certificate of counsel attached) filed by Pacific Magnesium, Inc., (formerly So-Cal Magnesium, Inc.), La Canada, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the
Treasury:

[Seal] /s/ D. L. SIEGRIST,
Head, Records Division Income Tax Unit, Bureau
of Internal Revenue.

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payments of the tax.

Kind of Assmt & Period covered 1944	List IT	Year 1945	Mo.	Account No.		Paid, Abated Credited		Pd. Abt. Cr. Pd. Pd. Pd. Pd.
				Page Line	Amount Ass'd	Date	Amount	
				4100636	3,122.07	3-15-45	780.52	
						6-15-45	780.52	
						9-17-45	780.52	
						12-13-45	780.51	
1944	IT	1948	Mar	8-Spl #2-40C Int to 3-8-48	300.86 55.74	3-29-48 11-14-47	94.64 254.29 7.67	Pd. Pd. Bal.
#17—3/16/48 1944	IT	1945		9400788	None		None	
1944	IT	1948	Mar	8-Spl #2-36 C EP Int to 3-8-48	36,352.39 6,493.13	3-23-48 11-14-47	1,043.72 41,116.50	Cr Cl Pd.
					*42,845.52		685.21	130573 Balance
							*42,845.52	
					Total 46,324.19	Total	46,324.19	

[* In pencil.]

Harry C. Westover
Collector of Internal Revenue

6th District Calif.
ica

Defendant's Exhibit A—(Continued)

Defendant's Exhibit A—(Continued)
Statement Attached to Claim for Refund of Excess
Profits Tax of Pacific Magnesium, Inc. (form-
erly So-Cal Magnesium, Inc.)—Calendar Year
1944

The complete statement of the facts of this matter are set out in a protest dated March 28, 1947, filed by the taxpayer in the office of the Internal Revenue Agent in Charge at Los Angeles, California.

Briefly, it may be stated that all of the stock of taxpayer and all of the stock of So-Cal Foundry was owned directly or indirectly by P. H. Sheedy. Mr. Sheedy was President of both corporations and a Director of each.

So-Cal Foundry claimed that taxpayer owed it \$39,335.07 as well as two other items of which we are not herein further concerned.

A Mr. Frank Gaines was at that time an officer of both corporations and wished to purchase the stock of So-Cal Foundry. On November 20, 1944, Messrs. Sheedy and Gaines entered into a contract by the terms of which Mr. Gaines purchased from Mr. Sheedy all of the stock of So-Cal Foundry and a \$14,000 note owing by So-Cal Foundry to Mr. Sheedy. Mr. Gaines paid Mr. Sheedy \$42,000 for the stock and further agreed that he would cause So-Cal Foundry to compromise and settle for \$4,000 its \$39,335.07 claim against taxpayer. The terms of this contract were carried out.

The Commissioner has determined that the \$35,335.07 constituted income to taxpayer and that it

Defendant's Exhibit A—(Continued)

was not includible in taxpayer's invested capital from November 29, 1944, on, either as old or new capital.

Taxpayer takes the position that either (1) the taxpayer paid to So-Cal Foundry all that it was able to pay and has no net worth after the settlement and hence did not realize income from the settlement of the debt or (2) So-Cal Foundry intended to and did make a gift to taxpayer and consequently the settlement would not be income or (3) Mr. Sheedy, the principal stockholder of taxpayer, made a contribution to its capital. If No. 3 is the correct solution, then taxpayer would have an increase in its invested capital as new invested capital as of November 20, 1944, in the amount of \$35,335.07.

The legal effect of these transactions is argued in the protest dated March 28, 1947, filed in the office of the Revenue Agent in Charge to which reference is hereby further made.

It is believed that the Commissioner has erred in his determination that said item of cancellation of debt was income to taxpayer and has further erred in excluding it from invested capital for 1944.

Taxpayer believes that it is entitled to a refund computed by eliminating from income said item of \$35,335.07 and by including in invested capital said item November 20, 1944, on, as new capital.

We request a re-payment of the \$30,487.39 plus \$4,877.98 (interest paid) plus interest thereon from November 14, 1947, as provided by law.

Defendant's Exhibit A—(Continued)

February 21, 1948.

Certificate of Counsel

I hereby certify that I prepared the attached Claim for refund on the basis of information furnished to me by the taxpayer, which information I believe to be true, but which I do not know of my own knowledge.

/s/ MELVIN D. WILSON,

819 Title Insurance Building
Los Angeles 13, California.

Admitted September 27, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 77, inclusive, contain the original Complaint; Answer; Condensation of the Testimony of Ralph D. Sweeney; Plaintiff's Exhibit 1 (Stipulation of Fact); Defendant's Exhibit A (Claim for Refund); Opinion; Order on Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond on Appeal; Statement of Points Relied on; and Designation of Portions of Record on Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of December, A.D. 1949.

EDMUND L. SMITH,

Clerk.

[Seal] By /s/ THEODORE HOCKE,

Chief Deputy.

[Endorsed]: No. 12436. United States Court of Appeals for the Ninth Circuit. Pacific Magnesium, Inc., (formerly Socal Magnesium, Inc.), Appellant, vs. Harry C. Westover, individually and as Collector of Internal Revenue for the Sixth District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 21, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
Docket No. 12436

PACIFIC MAGNESIUM, INC., (formerly Socal
Magnesium, Inc.),

Appellant,

vs.

HARRY C. WESTOVER, Collector of Internal
Revenue for the Sixth District of California,
Appellee.

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY AND
DESIGNATION OF THE PARTS OF THE
RECORD NECESSARY FOR THE CON-
SIDERATION THEREOF

To the United States Court of Appeals:

The appellant hereby adopts the Statement of the Points on Which It Intends to Rely, which was filed in the District Court, as its Statement of the Points on Which It Intends to Rely in this court.

Appellant designates the entire record as being necessary for the consideration of this appeal.

/s/ MELVIN D. WILSON,
Counsel for Appellant.

The appellee, Harry C. Westover, Collector for the Sixth District of California, through his attorney, hereby accepts service of a copy of the above entitled Statement of the Points on Which Appellant Intends to Rely and Designation of the Parts

of the Record Necessary for the Consideration
Thereof.

ERNEST A. TOLIN,

U. S. Attorney,

E. H. MITCHELL,

EDWARD R. McHALE,

Assistant U. S. Attorneys,

EUGENE HARPOLE,

ROBERT D. SCOTT,

JAMES B. PETTUS,

Special Attorneys.

/s/ EUGENE HARPOLE,

Counsel for Appellee.

[Endorsed]: Filed Dec. 29, 1949.

No. 12436

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC MAGNESIUM, INC. (formerly Socal Magnesium,
Inc.),

Appellant,

vs.

HARRY C. WESTOVER, Individually and as Collector of In-
ternal Revenue for the Sixth District of California,

Appellee.

BRIEF FOR THE APPELLANT.

FILED

FEB 24 1950

PAUL P. O'BRIEN,
CLERK

MELVIN D. WILSON,
819 Title Insurance Building, Los Angeles 13,
Counsel for Appellant.

TOPICAL INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Statement of the case.....	3
Statute and Regulations involved.....	6
Specification of errors.....	8
Argument	9
I.	
Summary of argument.....	9
II.	
The court erred in failing to find that Foundry intended to and did make a gift to appellant of \$35,335.07 on Novem- ber 20, 1944, by settling the claim of \$39,335.07 of Foundry against appellant, for \$4,000.00.....	11
III.	
The court erred in failing to find that P. H. Sheedy, appel- lant's sole stockholder, made a contribution to plaintiff's capital of \$35,335.07 on November 20, 1944.....	21
IV.	
The court erred in holding that the cancellation of indebted- ness constituted taxable income to appellant.....	26
Conclusion	28

TABLE OF AUTHORITIES CITED

CASES	PAGE
Boos v. Reynolds, 84 F. 2d 185.....	11
Brown Cab Company, Prentice-Hall Memorandum Tax Court Service, par. 43,263.....	24
Carroll-McCreary & Company, Inc. v. Commissioner, 124 F. 2d 203	22
Chenango Textile Corp. v. Commissioner, 148 F. 2d 296.....	24
Commissioner v. Auto-Strop Safety Razor Company, Inc., 74 F. 2d 226	22
Commissioner v. Jacobson, 336 U. S. 28.....	11, 12, 13
DeRoy & Company, Prentice-Hall Memorandum Tax Court Service, par. 44,154.....	23
Haden Company, Memo. B. T. A., Oct. 20, 1939; aff'd 118 F. 2d 285	18
George Hall Corporation 2 T. C. 146.....	23
Helvering v. American Dental Company, 318 U. S. 322.....	12, 13, 24, 27
Lakeland Gearing Company, 36 B. T. A. 289.....	18
The Midland Tailors, Prentice-Hall Memorandum Tax Court Service, par. 43,292.....	23
Scanlon, Robert H., 42 B. T. A. 997.....	21
Smith Insurance Service, Inc., 9 B. T. A. 284.....	24
Tanner Manufacturing Company, Prentice-Hall Memorandum Tax Court Service, par. 43,299.....	23
Tripple Z Products, Inc., decided Sept. 9, 1940, U. S. Dist. Ct., So. Dist. N. Y., In Bankruptcy, No. 61,868.....	23
United States v. Oregon-Washington Railroad & Navigation Company, 251 Fed. 211.....	24

STATUTES	PAGE
Civil Code, Sec. 1559.....	25
Internal Revenue Code, Sec. 22(a).....	6
Internal Revenue Code, Sec. 22(b)	6, 8, 9, 20
Internal Revenue Code, Sec. 1002	13
United States Code, Title 28, Sec. 1291.....	3

REGULATIONS	
Regulation 108, Sec. 86.2.....	21
Regulation 111, Sec. 29.22(a)-13.....	6, 22
Regulation 111, Sec. 29.22(a)-16	7, 26, 27

TEXTBOOK	
17 Corpus Juris Secundum, pp. 1121, 1123.....	25

No. 12436

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC MAGNESIUM, INC. (formerly Socal Magnesium,
Inc.),

Appellant,

vs.

HARRY C. WESTOVER, Individually and as Collector of Internal Revenue for the Sixth District of California,

Appellee.

BRIEF FOR THE APPELLANT.

Opinion Below.

The opinion in this case was written by United States District Judge Leon R. Yankwich, and was entered October 18, 1949 [R. 11 to 25, incl.], and is reported as 86 Fed. Supp. 644.

Jurisdiction.

This proceeding involves a suit for recovery of Federal corporate excess profits tax for the appellant's calendar year, 1944, in the amount of \$35,365.35 plus interest thereon of six per cent (6%) from November 14, 1947. [R. 6.]

Appellant is a corporation organized under the laws of California, having its principal place of business at 1201

El Vago, La Canada, California. [R. 2.] On March 15, 1945, appellant filed with the appellee, the Collector of Internal Revenue for the Sixth District of California, its income and excess profits tax returns for the calendar year 1944. On October 15, 1947, appellant received from the Commissioner of Internal Revenue, a letter issued under the provisions of Section 272 of the Internal Revenue Code, proposing a deficiency of \$36,352.39 in excess profits tax for the calendar year 1944. On November 14, 1947, appellant paid to the appellee, the Collector of Internal Revenue for the Sixth District of California, the \$36,352.39 demanded by the Commissioner of Internal Revenue, together with interest thereon amounting to \$5,816.38. On March 12, 1948, appellant filed with the appellee its claim for the refund of excess profits tax for the calendar year 1944 in the amount of \$30,487.39, plus interest paid thereon in the amount of \$4,877.98, plus statutory interest on both of said amounts. The grounds for the claim are the same as are set forth in the complaint and in this appeal. [R. 71 to 76, incl.; 2 to 6, incl.]

Neither the appellee nor the Commissioner of Internal Revenue nor anyone else audited said claim within six months of its filing, and appellant brought suit against the appellee in the United States District Court for the Southern District of California, Central Division. Jurisdiction was conferred on such Court by Section 3772 of the Internal Revenue Code.

Judgment was entered in favor of the appellee and against the appellant on October 31, 1949. [R. 29, 30.]

Within sixty (60) days and on November 30, 1949, Notice of Appeal, Cash Bond, Statement of Points Relied Upon, Designation of Portions of Record on Appeal, and

Condensation of the Testimony of Ralph D. Sweeney, were filed with the Clerk of the District Court, Southern District of California, Central Division. [R. 30 to 39, incl.] Jurisdiction is conferred on your Honorable Court by Section 1291 of Title 28 of the United States Code.

Statement of the Case.

This proceeding is an appeal from the judgment of the District Court of the United States, Southern District of California, Central Division, which determined that appellant was not entitled to a refund of Federal corporate excess profits taxes for the calendar year 1944 in the amount of \$35,365.35 plus interest thereon as provided by law.

The question for review is whether appellant realized taxable income in 1944 when a debt in the amount of \$39,335.07, owing by it to a corporation called Socal Foundry, was cancelled, appellant paying \$4,000.00 to the creditor.

The entire record has been brought up for review. There can be no controversy over the facts, as they were introduced by stipulation and the testimony of one witness, whose testimony did not contradict the stipulated facts.

As of November 20, 1944, one P. H. Sheedy owned all the stock of appellant and all of the stock of another corporation called Socal Foundry. He was president and a director of both companies. [R. 41 and 42.]

The names of the two companies are slightly confusing. Appellant, Pacific Magnesium, Inc., was formerly called "Socal Magnesium, Inc." It will be referred to as "Magnesium Company (appellant)," or as appellant. The other

company, "Socal Foundry," will be referred to as "Foundry."

Magnesium Company (appellant) on November 20, 1944, owed \$39,335.07 to Foundry on account of numerous transactions which occurred in 1943 and 1944, wherein Foundry supplied appellant supplies, services and equipment. While appellant had sufficient assets to pay this debt, the payment would require appellant to liquidate its capital assets, as it could not make the payment and continue in business. [R. 32, 33, 54.]

Mr. Sheedy was not well and desired to sell the stock of Foundry to a Mr. Gaines who had formerly been an officer and director of both companies and was familiar with their activities. On November 20, 1944, Frank Gaines was neither an officer nor a director of either company. [R. 42, 43.]

Mr. Sheedy was unwilling to sell the stock of Foundry without eliminating the debt appellant owed Foundry, as he feared that Gaines or a subsequent owner of the stock of Foundry would embarrass appellant and put it into liquidation in an effort to collect the debt owing by appellant to Foundry. [R. 32, 33.]

Accordingly, Mr. Sheedy, as part of the contract to sell the stock of Foundry to Mr. Gaines, stipulated that Foundry should compose its \$39,335.07 claim against appellant for \$4,000.00. [R. 33, 49.]

This arrangement suited Mr. Gaines very well as he had but a limited amount of money and this would enable him to buy the stock of Foundry for \$35,335.07 less than he otherwise would have to pay if Foundry's claim against appellant was to be collected. [R. 33, 34.]

Accordingly, on November 20, 1944, Sheedy and Gaines entered into a contract by the terms of which Sheedy sold the stock of Foundry to Gaines for \$42,000.00. [R. 48.] In that contract Sheedy bound Gaines to cause Foundry to compose the \$39,335.07 claim against appellant for \$4,000.00 and Gaines indemnified Sheedy and appellant against the possibility of paying the remaining \$35,335.07. [R. 48, 49.]

This contract, made between Sheedy and Gaines, was for the benefit of a third party, appellant, and it could enforce the contract against Gaines. Said contract, donated to appellant by its sole stockholder, was worth \$35,335.07, and appellant realized \$35,335.07 therefrom when Mr. Gaines caused Foundry to cancel for nothing the \$35,-335.07 debt owing from appellant. [R. 49, 43.]

The contract was executed and immediately carried into effect and on November 20, 1944, Gaines and his nominees were elected to the Board of Directors of Foundry and Sheedy and his nominees retired as directors of that company. [R. 34, 43.] Gaines and his nominees passed a resolution to carry the contribution into effect, as they were required to do. [R. 43, 55.]

The Commissioner of Internal Revenue determined that the \$35,335.07 constituted income to appellant, and appellant paid the tax and filed the claim for refund and brought this suit as heretofore stated. [R. 5, 9, 3.]

Appellant's position, in its claim for refund [R. 71] and before the District Court [R. 5] and in this appeal, is that the forgiveness of its debt by Foundry was a non-taxable gift from Foundry to appellant or was, in effect, a contribution of capital by appellant's sole stockholder, Mr. Sheedy, and in any event, was not taxable income to appellant.

Statute and Regulations Involved.

The statute involved is Section 22 of the Internal Revenue Code which in material part reads as follows:

“Section 22(a). General Definition.—‘Gross income’ includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(3) The value of the property acquired by gift, bequest, device or inheritance. . . .”

Regulation 111, Section 29.22(a)-13, reads in part as follows:

“Cancellation of indebtedness.—(a) In general.—The cancellation of indebtedness, in whole or in part, may result in the realization of income. If, for example, an individual performs services for a creditor,

who in consideration thereof cancels the debt, income in the amount of the debt is realized by the debtor as compensation for his services. A taxpayer realizes income by the payment or purchase of his obligations at less than their face value. In general, if a shareholder in a corporation which is indebted to him gratuitously forgives the debt, the transaction amounts to a contribution to the capital of the corporation to the extent of the principal of the debt."

Regulation 111, Section 29.22(a)-16, reads as follows:

"Contributions to corporation by shareholders.—If a corporation requires additional funds for conducting its business and obtains such needed money through voluntary pro rata payments by its shareholders, the amounts so received being credited to its surplus account or to a special capital account, such amounts will not be considered income, although there is no increase in the outstanding shares of stock of the corporation. The payments under such circumstances are in the nature of voluntary assessments upon, and represent an additional price paid for, the shares of stock held by the individual shareholders, and will be treated as an addition to and as a part of the operating capital of the company."

Specification of Errors.

The District Court of the United States erred:

1. In failing to find that Foundry intended to and did make a gift to appellant of \$35,335.07 on November 20, 1944, by settling the claim of \$39,335.07 of Foundry against appellant for \$4,000.00, and that such gift was to be excluded from appellant's gross income under the provisions of Section 22(b)(3) of the Internal Revenue Code.

2. In failing to find that P. H. Sheedy, appellant's sole stockholder, made a contribution to appellant's capital of \$35,335.07 on November 20, 1944, and that such contribution to capital by the stockholder was not income to appellant.

3. In finding that appellant realized \$35,335.07 taxable income out of a transaction on November 20, 1944, wherein a debt of \$35,335.07 was forgiven.

4. In rendering judgment for appellee on the facts found. [R. 37, 38.]

ARGUMENT.

I.

Summary of Argument.

The appellant contends that the forgiveness of the indebtedness does not constitute income to it, for either of two reasons.

First, that Foundry intended to benefit appellant to the extent of \$35,335.07 and that this amount constituted a gift from Foundry to appellant, and hence is not income under Section 22(b)(3) of the Internal Revenue Code.

P. H. Sheedy owned all of the stock of Foundry and was its president and a director. Its other directors were his nominees or “dummies” and subject to his control. At a time while those conditions obtained, Mr. Sheedy determined to benefit appellant to the extent of \$35,335.07 by having Foundry forgive the \$35,335.07 debt owing from appellant to Foundry. Mr. Sheedy’s intentions and desires necessarily constituted the intentions and desires of Foundry, as he could work his will upon that company. Foundry, therefore, through its sole stockholder, president and director, Mr. Sheedy, determined to benefit appellant to the extent of \$35,335.07, and the forgiveness of the \$35,335.07 debt was a gift, and not income, to appellant.

Instead of carrying out this intention and desire while in office, Mr. Sheedy entered into a binding contract which required the purchaser of Foundry stock to carry out such plan. The purchaser, Mr. Gaines, necessarily had to carry out such plan as he had agreed to do so, and had indemnified Mr. Sheedy and appellant against the \$35,335.07 debt.

Mr. Sheedy intended to cause Foundry to make a gift to appellant and required that his buyer cause it to do so. Hence the forgiveness by Foundry was a gift made with the intention of benefiting appellant and is not taxable.

Second, Mr. Sheedy made a capital contribution to appellant of \$35,335.07, and capital contribution made by a sole stockholder is not income.

Mr. Sheedy owned all the stock of appellant and of Foundry. In an economic and practical sense they were his instruments, his tools, his agents, his property.

Mr. Sheedy desired to take some property out of Foundry and put it into appellant. This he did by requiring Gaines to cause Foundry to cancel \$35,335.07 of appellant's debt, and this constitutes a capital contribution to appellant from its sole stockholder, Mr. Sheedy. Capital contributions are not income, and hence the capital contribution made by Mr. Sheedy in the form of forgiveness of the debt owing Foundry is not taxable income to appellant.

Looking at the matter from a different position, it is clear that Mr. Sheedy, appellant's sole stockholder, by his contract with Mr. Gaines, made a direct contribution to appellant of a right, enforceable by it, to require Gaines to cause appellant's debt of \$35,335.07 to be cancelled without consideration flowing from appellant. Mr. Sheedy made a contract for the benefit of appellant, a third person, which contract was worth \$35,335.07, and this amounts to a direct capital contribution to appellant from its sole stockholder, and is not taxable income.

II.

The Court Erred in Failing to Find That Foundry Intended to and Did Make a Gift to Appellant of \$35,335.07 on November 20, 1944, by Settling the Claim of \$39,335.07 of Foundry Against Appellant, for \$4,000.00.

In *Commissioner v. Jacobson*, 336 U. S. 28, the Supreme Court, in its latest consideration of the type of question involved in the case at bar, said:

“The situation in each transaction is a factual one. It turns upon whether the transaction is in fact a transfer of something for the best price available or is a transfer or release of only a part of a claim for cash and of the balance ‘for nothing.’ The latter situation is more likely to arise in connection with a release of an open account for rent or for interest, as was found to have occurred in *Helvering v. American Dental Company*, *supra*, than in the sale of outstanding securities, either of a corporation as described in Section 22(b)(9), or of a natural person as presented in this case.”

A recent example of a release “for nothing” is seen in *Boos v. Reynolds*, 84 F. 2d 185, where the lessor told the lessee to “forget” the back rent, and the court held that this was a gift to the lessee, and not income.

In the case at bar, it is believed that the evidence shows that Foundry transferred \$4,000.00 of the open account for \$4,000.00 cash, and \$35,335.07 of the open account “for nothing,” and that the latter was a non-taxable gift to appellant.

The trial court in the case at bar decided erroneously that Foundry did not make a gift to appellant of the \$35,335.07 for the following reasons:

1. That there can be no gift if there was any consideration flowing from the alleged donee, and here appellant paid \$4,000.00 to the creditor. [R. 19.]

2. That Gaines' views of the transaction would control rather than Sheedy's views. [R. 20, 21.]

3. That the form of the resolution adopted by Foundry's new Board of Directors and the writing off of the debt in its tax returns as a loss, indicated that no gift was intended. [R. 21.]

As to the first point, that there can be no gift if there is consideration from the alleged donee, the decision of the Supreme Court in *Helvering v. American Dental Company*, 318 U. S. 322, is directly to the contrary. In that case the debtor owed back rent amounting to \$15,298.99. The creditor accepted \$7,500.00 in payment of the \$15,298.99 debt and cancelled the remainder. Though in form this settlement was a compromise, the Supreme Court held that the forgiveness was gratuitous, the release of something to the debtor for nothing, and that the cancellation was a gift under Section 22(b)(3) of the Internal Revenue Code, and hence not taxable income to the debtor.

Furthermore, the Supreme Court in *Commissioner v. Jacobson*, 336 U. S. 28, again recognized, as shown by the quotation from that decision on page 11 of this brief, that in one transaction there might be a transfer of part of an open account for cash, and a release of the balance "for nothing," and that the latter would be a non-taxable gift.

It is otherwise clear that a single transaction can have two elements. For example, suppose that a father settled for \$1,000.00, a \$10,000.00 debt owing him from his solvent son. Though the transaction appeared to be a compromise in form, the \$9,000.00 would undoubtedly be treated as a gift, both for Federal Income Tax purposes and for Federal Gift Tax purposes. In Section 1002 of the Internal Revenue Code defining “gifts,” for the purpose of the Gift Tax, the following appears:

“Where property is transferred for less than adequate and full consideration in money or money’s worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the taxable year.”

While the Income Tax Law excludes gifts from gross income, it does not define them. The Gift Tax Law defines the word “gift” in considerable detail and the above quotation shows that a transaction can be part purchase, but still the value of the property transferred in excess of the consideration paid by the transferee, is a gift. That was the situation in *Helvering v. American Dental Company*, 318 U. S. 322, *supra*, discussed above, and the situation recognized in *Commissioner v. Jacobson*, 336 U. S. 28.

Consequently, the fact that Mr. Sheedy decided that the appellant, in the case at bar, would pay \$4,000.00 on account of its \$39,335.07 debt, does not characterize the entire transaction as an arm’s length transaction, nor indicate that the creditor, Foundry, was obtaining all it could get, but leaves the question open for further con-

sideration as to whether the creditor really intended to make a gift to the debtor of the balance.

Coming to the trial court's second error, the testimony of Mr. Sweeney, Sheedy's attorney (Mr. Sheedy being dead), shows that Mr. Sheedy wanted to improve the financial condition of appellant so that it could not be embarrassed by its creditors. [R. 32, 33.] This same donative intent was imputed to Foundry. [R. 34.]

Foundry, at the time this transaction was contracted, was wholly owned by Mr. Sheedy. [R. 42.] He owned all the stock and was the president and one of the directors of the company and necessarily controlled its every thought and action. [R. 42.] When he desired that appellant be benefited by a cancellation of the debt, Foundry had the same desire and intent and could have no other.

Instead of directly carrying out his benign purpose of benefiting appellant, Mr. Sheedy arranged it so that it would necessarily be carried out. He entered into a binding contract to the effect that Foundry would forgive some of the debt owing to it by appellant. [R. 49.]

All the parties to the contract knew that appellant had sufficient assets to pay its debt, if such assets were turned into cash, and that it could have paid Foundry the entire \$39,335.07. [R. 54, 15.] Consequently, when appellant paid \$4,000.00 to Foundry on the \$39,335.07 debt, it was not paying all it could pay. The cancellation of the \$35,335.07 debt was a gratuity to appellant from Foundry, at the instance of Mr. Sheedy. Mr. Sheedy and hence Foundry, wished to improve appellant's financial condition to the extent of \$35,335.07. [R. 32, 33.] Therefore, Foundry did not intend to collect from appellant all that it could collect. [R. 34.] Foundry knew that it could

collect the entire \$39,335.07 from appellant, but chose not to do so. It chose not to do so because its sole stockholder, Mr. Sheedy, chose not to do so. [R. 34.]

The court below seems to imply that Foundry could have an intention and a purpose different from that of its sole stockholder, president and director. It brings out the fact that there were two corporations involved and that they are separate entities from the stockholders, for tax purposes. [R. 16, 17.] This, of course, is true, but it does not take any citation of law to establish the fact that a corporation which is wholly owned by one man who is its president and director, is necessarily dominated by that man and must necessarily do his will, and do nothing but his will.

It is abundantly clear that Mr. Sheedy wished to improve appellant's financial condition—wished to increase its net worth by \$35,335.07. He accomplished this by having Foundry make the gift or contribution to appellant. Mr. Sheedy, having the power to do so, bound Foundry, through its new owner, Mr. Gaines, to make the contribution or gift to appellant of \$35,335.07.

Foundry was a separate corporation and appellant is not attempting to disregard its separate legal entity, but a corporation is simply a legal fiction, not a living, thinking, human being. It *must* act through its stockholders, officers and directors, and can not act otherwise. If all of its stock is owned by one man, who is the president and a director of the company, he necessarily dominates the other directors, who are his nominees, or “dummies,” and they and the corporation must do as he pleases, and the corporation's every intention, purpose and desire springs from him.

Consequently, Foundry could not possibly have any intention other than the intention given to it by its sole stockholder, president and director.

We come now to the third point on which the lower court erred. It seems to think that Foundry has shown, by the form of the resolution forgiving the debt, and its action in taking a bad debt deduction on its income tax return, that it attempted to get all from appellant that it could collect. In other words the court thought that Foundry got its intention and purpose from Mr. Gaines and not from Mr. Sheedy. [R. 20, 21.]

It is obvious from the facts that the control and ownership of Foundry changed on November 20, 1944, from Mr. Sheedy to Mr. Frank Gaines. [R. 43.] It is obvious too, from the contract of November 20, 1944 [R. 49], that Mr. Sheedy required Foundry, through his contract with Mr. Gaines, to forgive \$35,335.07 of the debt owing by appellant. When Foundry eventually carried that act out through the resolution adopted by Mr. Gaines and his nominees, it was carrying out a direction given to it by Mr. Sheedy, and its purpose and intent in carrying it out, derived from Mr. Sheedy and not from Mr. Gaines. [R. 34, 55.]

It is clear too, that Mr. Sheedy's purpose in causing Foundry to forgive \$35,335.07 of the debt was to benefit appellant. He caused Foundry to give appellant \$35,335.07 without consideration and merely to benefit appellant. [R. 32, 33.] Such benefit came to appellant gratuitously from Mr. Sheedy and Foundry.

Now the trial court brought out that the moment Mr. Gaines came into the picture, he not only caused Foundry to carry out the forgiveness, as he was bound to do, but

that he may have had a further idea in mind which he then proceeded to carry out, as the contract with Mr. Sheedy did not prohibit him from so doing. In other words, he may have intended that Foundry would attempt to take a bad debt deduction on its income tax returns and that plan may have dictated the form of the language in the resolution cancelling the debt wherein it said:

“Whereas, it is the belief of the directors of this corporation that said Socal Magnesium, Inc. is unable to pay its said debt and if this corporation can obtain the sum of \$4,000.00 from said Socal Magnesium, Inc. in payment of said debt, that it would be a wise and proper thing to do.” [R. 55.]

It might appear, therefore, that Foundry changed from a benign, generous Dr. Jekyll, as represented by Mr. Sheedy's intention, to a grasping and scheming Mr. Hyde, represented by Mr. Gaines' desires. Mr. Sheedy, of course, had nothing to do with Foundry after he had disposed of its stock, except to enforce his contract with Gaines.

Stated differently, Foundry, to the extent dominated by Mr. Sheedy, desired to make a gift to appellant. That much is clear. On the other hand, Foundry, if and to the extent dominated by Mr. Gaines in the transaction, desired to treat the forgiveness as a bad debt, deductible on the income tax return. If Mr. Gaines had not been bound by the contract, he would have insisted that appellant pay the entire debt to Foundry. Gaines would not have been satisfied with an attempt to get a bad debt deduction.

The question then remains—which sole stockholder of Foundry controlled for the purpose of the forgiveness and of this case?

The court below apparently holds that Mr. Gaines' intent governed, as the court indicated that Foundry was effecting an accord and satisfaction and getting all it could for a claim of an uncertain amount, and the balance of its claim was a bad debt, deductible on its tax return. [R. 20, 21.] The lower court was inconsistent, as it stated that appellant was able to pay the debt in full. [R. 15.] Since appellant was able to pay the debt in full, Foundry could not possibly have had a bad debt, as a bad debt is one which is uncollectible and worthless. If Foundry's claim against appellant was uncollectible, then it follows that appellant was insolvent, before and after the cancellation, and hence realized no income from the cancellation.

Lakeland Grocery Company, 36 B. T. A. 289;

Haden Company, Memorandum B. T. A., decided 10/20/29, aff'd 118 F. 2d 285, certiorari denied.

Appellant claims that Foundry could have collected all that was owing to it from appellant and this is shown by the balance sheet [R. 54] and by the statement of the court below [R. 15], which is believed to be correct, that both before and after the cancellation of the debt, appellant was solvent. It was solvent beforehand and, therefore, could have fully paid its debt to Foundry.

Furthermore, the Stipulation specifically states that appellant owed Foundry \$39,335.07 on open account as of November 20, 1944. Since P. H. Sheedy owned both corporations, how could there be any doubt about the amount of the claim owing from appellant to Foundry? There certainly could not be any dispute about it and the Stipulation [R. 43] shows that the debt was specifically owing in that amount. Therefore, it was not a claim for an

uncertain amount, as the trial court stated [R. 20], but was an account for \$39,335.07.

The court below erred in concluding that Foundry was in a legal position on November 20, 1944, to endeavor to collect more than \$4,000.00 from appellant. [R. 20.] The court erred in concluding that Foundry had the right to attempt to collect the entire debt, but having realized that no more could be collected from appellant, chose to receive the \$4,000.00 as a compromise or as an accord and satisfaction. [R. 20.]

This is entirely unrealistic, as Foundry was not a free agent. If it had been, it could and would have collected the entire amount of the debt. [R. 15.] It was bound by Mr. Sheedy to forgive \$35,335.07 of the debt. It had no opportunity to attempt to collect more than \$4,000.00 and no opportunity to get all that it could. It was required by Mr. Sheedy to make a gift or contribution to appellant of a collectible, certain debt. [R. 49.]

The situation may be compared with one where A has a house worth \$25,000.00 and furniture worth \$10,000.00. B is desirous of buying the house and furniture, but A wants the furniture for his son who has just married, so A and B enter into an agreement whereby A sells the house and furniture to B for \$25,001.00 with the further agreement that B will sell the furniture to A's son for \$1.00. Now if this transaction is carried out in that form, would it be fair to question B's sagacity as a business man and state that he sold furniture worth \$10,000.00 for \$1.00? It is obvious that B had no opportunity to sell that furniture for its full value. For some reason he came into ownership of the furniture but subject to a condition, namely, that he sell it for \$1.00 to a certain person.

Similarly, Foundry, momentarily after the execution of the contract between Messrs. Sheedy and Gaines, had on its books an account receivable against appellant for \$39,335.07, but Foundry was not a free agent to collect that fully collectible item. By a contract made between the persons who successively owned all of its stock it was bound to forgive \$35,335.07 of the debt. Under these circumstances, could anyone say that Foundry collected all that was otherwise collectible? Could anyone say that Foundry suffered a bad debt loss of \$35,335.07? Could anyone say that Mr. Gaines really expected or had an opportunity to collect for Foundry and hence, for himself, the additional \$35,335.07 owing from appellant? Could anyone say that Foundry and appellant, after the sale of Foundry's stock to Gaines, negotiated for the settlement of the debt?

The obvious answers to these questions bring out the true situation; that Mr. Sheedy, while in control of Foundry, caused it to forgive a debt owing by appellant, for the purpose of benefiting appellant, and this forgiveness, made for that purpose, was a gift by Foundry, which purpose generated from its sole stockholder. The fact that the transaction was not completely carried out until the moment after Mr. Sheedy had executed the contract and turned over the stock to Mr. Gaines, is immaterial. He bound Mr. Gaines and hence, Foundry, to his purpose of making the gift from Foundry to appellant.

Since the forgiveness by Foundry to appellant was gratuitous and made for the purpose of benefiting appellant, it amounted to a gift, and hence the transaction is non-taxable under Section 22(b)(3) of the Internal Revenue Code.

III.

The Court Erred in Failing to Find That P. H. Sheedy, Appellant's Sole Stockholder, Made a Contribution to Plaintiff's Capital of \$35,335.07 on November 20, 1944.

The facts show that appellant could have paid its full debt to Foundry, but it would have had to liquidate its capital assets to do so. [R. 54, 15.] Mr. Sheedy wished it to continue in business and to keep its capital assets for that purpose, so he caused to be donated to it additional capital of \$35,335.07 in the form of a forgiveness of indebtedness by Foundry. [R. 32, 33.]

Within the meaning of the word "gift" as found in the Income Tax Statute, Mr. Sheedy made a gift to appellant of \$35,335.07.

In Regulation 108, Section 86.2 of the Internal Revenue Code relating to the Gift Tax, appears the following definition of gifts:

"In the following examples of some transactions resulting in taxable gifts, it will be understood that the transfers were not made for an adequate and full consideration in money or money's worth: 1. Transfer of property by a corporation to B is a gift to the latter from the stockholders of the corporation. If B himself is a stockholder, the transfer, not being a distribution from earnings or in liquidation to which B is entitled as a stockholder, is a gift to him from the other stockholders."

In *Robert H. Scanlon*, 42 B. T. A. 997, it was held that a voluntary contribution by a sole stockholder, to the corporation, was not a taxable gift, because he alone was benefited.

In other words, where corporations are donors or donees of gifts, the realities are considered for gift tax purposes, and the stockholders are treated as the real donors and donees.

Suppose that Mr. Sheedy had owned all the stock of Foundry, but his children had owned all the stock of appellant. If then Mr. Sheedy had caused Foundry to gratuitously forgive the \$35,335.07 debt owing by appellant, this would have amounted to a gift from Mr. Sheedy to his children and such gift would have been subject to gift tax.

Looking at the realities of the situation in the case at bar, Mr. Sheedy made a gift to appellant by causing his creature, Socal Foundry, to make that gift.

A gratuitous cancellation by a stockholder of a corporate debt owing to the stockholder is a contribution to its capital and, of course, not income. The Regulation 111, Section 29.22(a)(13), promulgated in connection with the income tax, reads in part as follows:

“In general, if a shareholder in a corporation which is indebted to him gratuitously forgives the debt, the transaction amounts to a contribution to the capital of the corporation to the extent of the principal of the debt.”

This principle has been recognized by a number of courts. In *Carroll-McCreary & Company, Inc., v. Commissioner*, 124 F. 2d 203, the cancellation by stockholder-officers of unpaid salaries was held to be a contribution to the capital of the company and not income to it. In *Commissioner v. Auto-Strop Safety Razor Company, Inc.*, 74 F. 2d 226, the creditor corporation which was the sole stockholder of the debtor corporation, forgave the debt in

order to improve the financial condition of its subsidiary. The court held that the forgiveness did not constitute income to the debtor, even though the debtor had deducted and obtained tax benefits when the debt was accruing as royalties and interest payable to the creditor. In the matter of the *Tripple Z Products, Inc.*, decided on September 9, 1940, by the United States District Court, Southern District of New York, In Bankruptcy, No. 61,868, salaries for the year 1933 were forgiven in 1934 by the two officers who were the only stockholders of the company. The forgiveness of the debt was held not to be income to the corporation. There again the corporation had deducted the salaries and had enjoyed the tax benefit, but this was held to be immaterial. The court also held as immaterial the fact that the creditor's stock in the debtor was increased in value by the forgiveness, the court deciding that this was not a consideration moving to the creditor. It was simply an additional investment by the stockholders in the company.

In *George Hall Corporation*, 2 T. C. 146, a cancellation of interest owing to a large stockholder was held to be not income to the corporation.

In a number of other cases corporate debts to stockholders were gratuitously cancelled and the cancellation was treated as contributions to the capital of the corporations and not taxable income. See:

The Midland Tailors, Paragraph 43,292, Prentice Hall Memorandum Tax Court Service;

Tanner Manufacturing Company, Paragraph 43,299, Prentice Hall Memorandum Tax Court Service;

S. H. DeRoy & Company, Paragraph 44,154, Prentice Hall Memorandum Tax Court Service.

In *Brown Cab Company*, Paragraph 43,263, Prentice Hall Memorandum Tax Court Service, the Cab Company owed money to Mr. Brown, the sole stockholder, and also owed money to the Brown Transfer Company, which likewise was solely owned by Mr. Brown. Mr. Brown cancelled his claim against the Cab Company and caused the Transfer Company to cancel its claim against the Cab Company. The Tax Court, relying on *Helvering v. American Dental Company*, 318 U. S. 322, held that the Cab Company did not realize taxable income from either of these cancellations. There is a great deal of similarity between the facts of that case and the facts in the case at bar. In both cases the sole stockholder of the debtor and creditor corporations caused the creditor corporation to forgive an inter-company debt.

In *U. S. v. Oregon-Washington Railroad & Navigation Company*, 251 Fed. 211, the cancellation of a debt owing to a sole stockholder was held an increase of capital and not income. Other cases holding that the cancellation of a debt by a stockholder was a gift to the corporation and not income, follow:

Smith Insurance Service, Inc., 9 B. T. A. 284;

Chenango Textile Corporation v. Commissioner,
148 F. 2d 296.

It is obvious, therefore, that Mr. Sheedy indirectly made a contribution to the capital of appellant.

The court below concluded that the cancellation of the indebtedness was not a capital contribution by appellant's sole stockholder, for the reason that Sheedy was that stockholder, but Foundry was the creditor, and their separateness could not be ignored. [R. 16, 17, 18.]

But the lower court has overlooked a most important point.

The contract between Sheedy and Gaines specifically provides that Gaines will “save and hold—Socal Magnesium, Inc. (now Pacific Magnesium Inc.) . . . wholly and completely harmless from any and all liability, claims or demands of whatsoever nature arising from or which may accrue to or be asserted against Socal Magnesium, Inc. by reason of said compromise and settlement of said claim.” [R. 49.]

Under Section 1559 of the California Civil Code, “A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” That has long been the law in California.

17 C. J. S. 1121, 1122.

In other words, Sheedy made a contract for the benefit of appellant, a contract appellant could enforce, a contract worth \$35,335.07 to appellant. Mr. Sheedy, the sole stockholder of appellant, did this, not Foundry. He delivered to appellant an enforceable contract, by which appellant could force a solvent individual, Mr. Gaines, to pay or cause to be cancelled, appellant’s \$35,335.07 debt to a creditor, Foundry. Appellant realized a \$35,335.07 benefit from this gift by Sheedy. The effect of this contract was similar to a gift of \$35,335.07 cash directly from Sheedy to appellant.

Consequently, the lower court was in error when it concluded that the contribution was not from the sole stockholder. The court was in error when it concluded that the “contribution” was made by Foundry, while domi-

nated by Gaines, and was an accord and satisfaction for all that Foundry could get.

Regulation 111, Section 29.22(a)-16, as quoted on page 22 of this brief, shows that a contribution to the capital of a corporation by a stockholder is not income to the company.

IV.

The Court Erred in Holding That the Cancellation of Indebtedness Constituted Taxable Income to Appellant.

In the second section of this brief it was shown that Foundry had an intention and purpose, which generated from its sole stockholder, Mr. Sheedy, to gratuitously forgive a collectible debt due from appellant, for the purpose of benefiting appellant, and that this benefit to appellant was a gift to it and not subject to income tax under the statute.

In the third section of the brief it is shown that in the alternative, Mr. Sheedy made a gift to appellant as a contribution to its capital, by causing the creditor to cancel a debt. The regulations and decided cases show that a gratuitous forgiveness of a debt owing by a corporation to a shareholder is a contribution to its capital and is not income.

Another way of looking at Mr. Sheedy's contribution to appellant is to note that the sole stockholder, Mr. Sheedy, directly donated to appellant a right or chose in action entitling appellant to enforce a direct benefit from Mr. Gaines, to the extent of \$35,335.07. Appellant realized \$35,335.07 from this contribution from its sole stockholder, Mr. Sheedy, by having its debt of \$35,335.07 to Foundry cancelled without consideration.

Under this facet of the transaction, appellant received a capital contribution directly from its sole stockholder, which, under Regulation 111, Section 29.22(a)-16, quoted on page 22 of this brief, was not income to appellant.

It would not be inequitable to the Government to rule that this cancellation constituted a gift to appellant, not subject to income tax. While Foundry, under the guidance of Mr. Gaines, attempted to get a tax benefit out of the cancellation, it availed it nothing and the Government did not lose any revenue through the deduction by Foundry. Neither Mr. Sheedy nor appellant had anything to do with this matter. Consequently, there is no occasion for straining a point to protect the Government against an injustice, but on the contrary, it would be an injustice to tax appellant on this transaction, as it was a gift from Foundry or a capital contribution from Mr. Sheedy. While there was no tax benefit to Foundry here, the cases show that the existence of a tax benefit to either party to the transaction is immaterial. In *Helvering v. American Dental Company*, 318 U. S. 322, the debtor had accrued and deducted the interest and rent in prior years and had received a tax benefit. Nevertheless, when the unpaid interest and rent was forgiven, the Supreme Court held that this did not constitute taxable income.

In the case at bar the debt was an open book account which is not ordinarily the subject of sale between parties. Furthermore, both the creditor and the debtor were, in this case, owned by the same man, who negotiated with himself in making this cancellation. In parting with control of

the creditor company, he required its new owner to forgive the debt, so that the creditor corporation never had an opportunity to collect more than the \$4,000.00, but was required to make a gratuitous cancellation of a collectible debt. This was not a bad debt, but a gift.

Conclusion.

Appellant contends that the District Court clearly erred in treating the \$35,335.07 item as taxable income to appellant and the decision should be reversed on this point.

Dated at Los Angeles, California, on this 23rd day of February, 1950.

Respectfully submitted,

MELVIN D. WILSON,

Counsel for Appellant.

No. 12436

In the United States Court of Appeals
for the Ninth Circuit

PACIFIC MAGNESIUM, INC., (FORMERLY SOCIAL MAGNE-
SIUM, INC.), APPELLANT

v.

HARRY C. WESTOVER, INDIVIDUALLY AND AS COLLECTOR
OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF
CALIFORNIA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
HILBERT P. ZARKY,
Special Assistants to the Attorney General.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL,
EDWARD R. McHALE,
Assistant United States Attorneys.

FILED

MAR 31 1930

PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	3
Summary of argument	6
Argument:	
The court below was correct in holding that the taxpayer received taxable income when its creditor settled an indebtedness for less than its face amount, and in determining that the taxpayer did not receive a gift or a contribution to capital	7
Conclusion	19
Appendix	20

CITATIONS

Cases:

<i>Becker v. Bank of Commerce Liquidating Co.</i> , 102 F. 2d 633, certiorari denied, 308 U. S. 578.....	17
<i>Biddle Avenue Realty Corp. v. Commissioner</i> , 94 F. 2d 435....	17
<i>Carlisle Tire & Rubber Co. v. Commissioner</i> , 168 F. 2d 816....	18
<i>Commissioner v. Jacobson</i> , 336 U. S. 28.....	8
<i>Doylestown & Eastern Motor Coach Co. v. Commissioner</i> , 9 T.C. 846	18
<i>Founders General Co. v. Hoey</i> , 300 U. S. 268.....	16
<i>Hall, George, Corp. v. Shaughnessy</i> , 67 F. Supp. 748.....	18
<i>Jergens, Andrew, Co. v. Connor</i> , 125 F. 2d 686.....	14
<i>Liberty Mirror Works v. Commissioner</i> 3 T.C. 1018.....	18
<i>Quock Ting v. United States</i> , 140 U. S. 417.....	14
<i>Ruud v. American Packing & Provision Co.</i> , 177 F. 2d 538....	9
<i>Smith, Frederick, Enter. Co. v. Commissioner</i> , 167 F. 2d 356....	16
<i>Taft v. Commissioner</i> , 92 F. 2d 667, affirmed, 304 U. S. 351....	17
<i>United States v. Amer. Chicle Co.</i> , 291 U. S. 426.....	8
<i>United States v. Cumberland Pub. Serv. Co.</i> , 338 U. S. 451....	16
<i>United States v. Gypsum Co.</i> , 333 U. S. 364.....	9
<i>United States v. Kirby Lumber Co.</i> , 284 U. S. 1.....	8
<i>United States v. Yellow Cab Co.</i> , 338 U. S. 338.....	9

Statutes:

Internal Revenue Code:

Sec. 22 (26 U.S.C. 1946 ed., Sec. 22).....	20
Sec. 718 (26 U.S.C. 1946 ed., Sec. 718).....	21

Miscellaneous:

Rules of Civil Procedure, Rule 52.....	9
Treasury Regulations 111:	
Sec. 29.22(a)-13	21
Sec. 29.22(a)-16	22
Sec. 29.22(b) (3)-1	22

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12436

PACIFIC MAGNESIUM, INC., (FORMERLY SOCAL MAGNE-
SIUM, INC.), APPELLANT

v.

HARRY C. WESTOVER, INDIVIDUALLY AND AS COLLECTOR
OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF
CALIFORNIA, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court (R. 11-25) is reported at 86 F. Supp. 644.

JURISDICTION

This case arises on appeal from a judgment of the United States District Court for the Southern District of California, Central Division, in favor of the defendant. (R. 29-30.)

On March 12, 1948, within the time allowed by law, the taxpayer filed a claim for refund with the Collector

of Internal Revenue for the Sixth District of California, seeking a refund of \$30,487.39, plus interest paid thereon in the amount of \$4,877.98, plus statutory interest on these amounts, this being part of a deficiency in excess profits tax for the year 1944, plus interest, asserted by the Commissioner of Internal Revenue, and paid by the taxpayer to the Collector of Internal Revenue for the Sixth District of California, on November 14, 1947. (R. 3-4, 8, 71-76.) No action was had on the claim for refund and, after the expiration of six months, this action was commenced against the Collector of Internal Revenue, to whom payment had been made, by the filing of a complaint on September 23, 1948, to recover payment of the taxes and interest alleged to have been overpaid. (R. 2-7.) The jurisdiction of the District Court rested on 28 U.S.C., Section 1340.

The judgment of the District Court was entered on October 31, 1949. (R. 29-30.) Notice of appeal was filed by the taxpayer on November 30, 1949. (R. 35.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED

Was the court below correct in holding that the taxpayer received taxable income when its creditor settled a debt for less than its face amount, and in holding that the taxpayer did not receive a gift or a contribution to its capital?

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

A portion of the facts in this case was stipulated (R. 40-68), and a portion was adduced by testimony (R. 30-35), and by exhibits (R. 69-76).

Prior to November 20, 1944, P. H. Sheedy, individually, and as trustee and beneficiary, owned all the capital stock of two corporations, one being the taxpayer (then known as Socal Magnesium, Inc.) and the other being Socal Foundry. (R. 11-12, 41-42.) As of that time, the taxpayer was indebted to Socal Foundry in several respects, including one indebtedness on an open account for supplies, services, and equipment furnished by Socal Foundry to the taxpayer in 1943 and 1944. The amount of this open account indebtedness was \$39,335.07. (R. 43.) Socal Foundry was indebted to Sheedy on a promissory note in the amount of \$14,000. (R. 47.)

On November 20, 1944, Sheedy and Frank Gaines entered into a contract (R. 12-13, 42-43, 46-53), whereby Sheedy sold all his stock in Socal Foundry to Gaines and transferred to Gaines the obligation of \$14,000 which was owing to him from Socal Foundry. Gaines paid \$42,000 in cash to Sheedy, plus an additional \$14,000 for the note, and undertook to cause Socal Foundry (R. 49) "to compromise and settle its claim against" the taxpayer for the payment of \$4,000.

After the execution of the agreement, Gaines and his nominees were elected as the directors and officers of Socal Foundry in place of Sheedy and his nominees. (R. 13, 43.) Socal Foundry's new directorate then

adopted a resolution which, after reciting the taxpayer's indebtedness to it, provided as follows (R. 55) :

Whereas it is the belief of the directors of this corporation that said Socal Magnesium Inc. is unable to pay its said debt and that if this corporation can obtain the sum of \$4,000.00 from said Socal Magnesium Inc. in settlement of said debt, that it would be a wise and proper thing to do.

Now, Therefore, Be It Resolved that this corporation accept from Socal Magnesium Inc. the sum of \$4000.00 as payment in full of all monies and other things of value that may be due and owing to this corporation from Socal Magnesium Inc., * * *.

Resolved Further that the President and Secretary of this corporation be and they are hereby authorized and directed to execute a General Release in the name of and for and on behalf of this corporation, and to affix the corporate seal thereto, releasing said Socal Magnesium Inc. from the payment of any monies owing to this corporation, except as aforesaid, in consideration of the payment of \$4000.00 by Socal Magnesium Inc. to this corporation.

In its tax return for 1944, Socal Foundry deducted \$35,335.07 as a bad debt. This arose from the cancellation of the debt owing from the taxpayer. The Commissioner of Internal Revenue did not disallow the deduction. Because of other deductions, the bad debt deduction resulted in no tax benefit to Socal Foundry. (R. 15, 45.)

The taxpayer, on its books, credited the amount of the indebtedness which was forgiven by Socal Foundry, namely, \$35,335.07 to "Capital Surplus" and debited

the same amount to "Accounts Payable, Socal Foundry." Socal Foundry and the taxpayer each kept their books and filed their income and excess profits tax returns on the accrual basis. (R. 44.)

At the time of the trial, Sheedy was deceased. The taxpayer offered the testimony of Sweeney, Sheedy's attorney, who testified that part of the consideration for which Sheedy sold the stock to Gaines was the undertaking that Socal Foundry would cancel the taxpayer's debt for \$4,000. He also testified that Socal Foundry carried out this purpose or motive in adopting the resolution to release the taxpayer for \$4,000, and that he was one of the directors at that time. (R. 34.)

The tax deficiency in this case arose from the fact that the Commissioner determined that, in computing its excess profits taxes, the taxpayer should have included in income the amount of the debt forgiven by Socal Foundry, namely, \$35,335.07, and that the taxpayer should not have included in its equity invested capital for 1944 any part of that amount. (R. 5.) The taxpayer's claim for refund (R. 71-76) and its complaint below (R. 5) were on the theory that Socal Foundry had made a gift of income to it, or that Sheedy had made a contribution to its capital.

The court below, in denying the taxpayer's claim, found that Socal Foundry did not intend a gratuitous forgiveness of the indebtedness, and that the purpose of the parties was to compromise the debt which was owing. It was also determined that no contribution of capital had been made to the taxpayer. Consequently, the court below held that the taxpayer was in receipt of taxable income in the amount of \$35,335.07, that no part

of that amount was includible in its equity invested capital, and that the taxpayer had not overpaid its excess profits tax. (R. 11-28.)

SUMMARY OF ARGUMENT

Whether the taxpayer was in receipt of taxable income when its creditor settled a debt for less than face amount, as the court below held, or whether the taxpayer's creditor intended to make a gift to it, as the taxpayer contends, which would not be taxable income, is a question of fact. The court below, considering all the evidence, concluded that the creditor did not intend to make a gift, and that the settlement of the indebtedness was a compromise or an accord and satisfaction. This finding is firmly supported by the record, including the provisions of the documents and the contemporaneous action of the creditor in claiming a bad debt deduction. While the testimony of the taxpayer's witness was that the creditor was not compromising a doubtful claim or one of dubious collectibility, the court below was not required to accept his testimony in preference to the other, contradictory evidence. Furthermore, he did not testify that the creditor intended to bestow a gratuity and, consequently, there is nothing in the record to show that the creditor did intend to make a gift.

The lower court's further conclusion that the taxpayer did not receive a contribution to its capital is also fully warranted by the record. The creditor, who released the claim for less than its face value, was not a stockholder of the taxpayer and could not have made a contribution to its capital. The taxpayer's sole stock-

holder did not release or forgive any indebtedness owing to him from the taxpayer, and, consequently, did not make a contribution to its capital. While the taxpayer asserts that the entire transaction should be recast and should be considered from the viewpoint of what the parties might have done, the court below was correct in holding that the intention of the parties and the tax consequences of what they did do should be controlled by the transaction which they did carry out, and not be governed by what they might have done.

In no event was the taxpayer entitled to add any part of the released obligation to its equity invested capital. If the taxpayer received income from the transaction, as the court below held, its equity invested capital would not be affected thereby until the beginning of the next taxable year. And, even if the taxpayer was the recipient of a gift or of a contribution to its capital by the release of the obligation, as the taxpayer contends, this forgiveness of indebtedness would not result in an increase in its equity invested capital.

ARGUMENT

The Court Below Was Correct in Holding That the Taxpayer Received Taxable Income When its Creditor Settled an Indebtedness for Less than its Face Amount, and in Determining That the Taxpayer Did Not Receive a Gift or a Contribution to Capital

The issue in this case is whether the taxpayer realized taxable income in the amount of \$35,335.07 when its creditor settled an outstanding debt of \$39,335.07 for \$4,000, and whether the court below was correct in holding that, under the circumstances, the facts did not support the taxpayer's contentions that there was a gift to it or a contribution of capital of \$35,335.07.

It is well settled that the profit realized by a debtor whose obligation is extinguished by payment of an amount less than that which is owing, constitutes gain which is taxable income within the broad sweep of Section 22 (a) of the Internal Revenue Code (Appendix, *infra*). *Commissioner v. Jacobson*, 336 U. S. 28, 38-41; *United States v. Amer. Chicle Co.*, 291 U. S. 426; *United States v. Kirby Lumber Co.*, 284 U. S. 1, 3; Treasury Regulations 111, Sec. 29.22 (a)-13 (Appendix, *infra*).

The taxpayer, however, contends that the income which was realized was a "gift" to it from the debtor and, accordingly, to be excluded from taxable income under the provisions of Section 22 (b)(3) of the Internal Revenue Code (Appendix, *infra*). (Br. 11-20.) This contention, which is frequently made in cases of this kind, must be considered in relationship to the broad application to be given to Section 22 (a) and the more narrow construction to be given to Section 22 (b). As the *Jacobson* opinion points out in referring to these two sections (p. 49) :

The income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are specifically stated and should be construed with restraint in the light of the same policy. * * *

In considering whether the taxpayer here was the recipient of a gift, it should be emphasized that the issue essentially presents a question of fact, namely, whether the creditor was actuated by a donative intent, so that it can be concluded that a gratuity was bestowed on the debtor as a gift. Thus, in the *Jacobson* case it

was stated (p. 51): "The situation in each transaction is a factual one."

In the present case, the trial judge found as a fact that the debtor (R. 27) "had no intention of gratuitously forgiving such debt or any part of it" and, instead, that the transaction "was effected with the purpose of compromising the debt * * *." These findings, of course, will not be disturbed on appeal unless "clearly erroneous," with proper regard being given to the opportunity "of the trial court to judge of the credibility of the witnesses." Rule 52 (a), Rules of Civil Procedure; *United States v. Yellow Cab Co.*, 338 U. S. 338, 340-342; *United States v. Gypsum Co.*, 333 U. S. 364, 394-395; *Ruud v. American Packing & Provision Co.*, 177 F. 2d 538, 540 (C.A. 9th). The evidence, we submit, amply justifies the trial court's conclusions, as will be apparent from a consideration of the circumstances of the case.

The undisputed, stipulated facts show that prior to November 20, 1944, P. H. Sheedy, individually, and as trustee and beneficiary, owned all the capital stock of the taxpayer (then known as Socal Magnesium, Inc.) and of Socal Foundry. (R. 11-12, 41-42). At that time, the taxpayer owed certain amounts to Socal Foundry, including an indebtedness of \$39,335.07 on an open account for supplies, services, and equipment furnished by Socal Foundry to the taxpayer in 1943 and 1944. (R. 43.)

On November 20, 1944, Sheedy and Frank Gaines entered into a contract (R. 12-13, 42-43, 46-53) whereby Sheedy sold to Gaines all his stock in Socal Foundry, and a note of \$14,000 which was owing to him from Socal

Foundry. Gaines paid \$42,000 in cash to Sheedy (plus an additional \$14,000 for the note) and undertook to cause Socal Foundry (R. 49) "to compromise and settle its claim against" the taxpayer for the payment of \$4,000.

On the same day, after the execution of the agreement, Gaines and his nominees were elected as the directors and officers of Socal Foundry in place of Sheedy and his nominees. (R. 13, 43.) Socal Foundry's new directorate then adopted a resolution which, after reciting the taxpayer's indebtedness to it, provided as follows (R. 55):

Whereas it is the belief of the directors of this corporation that said Socal Magnesium Inc. is unable to pay its said debt and that if this corporation can obtain the sum of \$4000.00 from said Socal Magnesium Inc. in settlement of said debt, that it would be a wise and proper thing to do.

Now, Therefore, Be It Resolved that this corporation accept from Socal Magnesium Inc. the sum of \$4000.00 as payment in full of all monies and other things of value that may be due and owing to this corporation from Socal Magnesium Inc. * * *.

Resolved Further that the President and Secretary of this corporation be and they are hereby authorized and directed to execute a General Release in the name of and for and on behalf of this corporation, and to affix the corporate seal thereto, releasing said Socal Magnesium Inc. from the payment of any monies owing to this corporation, except as aforesaid, in consideration of the payment of \$4000.00 by Socal Magnesium Inc. to this corporation.

Socal Foundry, in its tax return for 1944, deducted \$35,335.07 as a bad debt on account of the cancellation of the debt owing from the taxpayer. This deduction was not disallowed by the Commissioner of Internal Revenue. (R. 15, 45.)

In addition to the stipulated facts, the only other evidence offered by the taxpayer was the testimony of Sweeney, Sheedy's attorney, Sheedy being deceased at the time of the trial. Sweeney testified that "part of the consideration" for which Sheedy sold the Socal Foundry stock to Gaines was the undertaking that Socal Foundry would cancel the taxpayer's debt for \$4,000, since otherwise Sheedy "would probably lose * * * or would be obliged to pay more money into" the taxpayer. He also testified that such was the purpose or motive of Socal Foundry in adopting the resolution to release the taxpayer for \$4,000, and that he was one of the directors at that time. (R. 33-34.)

The evidence conclusively negates any possible suggestion that Socal Foundry was actuated by donative motives in settling the obligation for less than its face amount, or that the taxpayer was in any manner the recipient of a gift which would be excluded from income under Section 22 (b) (3). The trial court concluded, on all the evidence, that Socal Foundry did not intend to make a gift, but that there was some dispute concerning the amount of the obligation or the ability to collect the debt, and that the final release of the taxpayer by Socal Foundry constituted a valid compromise of the claim or an accord and satisfaction. (R. 20-21, 27.) Under this view of the evidence, it is plain that no gift was

made. The recitations in the agreement between Sheedy and Gaines (R. 48), together with the fact that the agreement itself (R. 49) provided that Gaines would cause Socal Foundry “to compromise” the claim, plus the fact that the corporate resolution of Socal Foundry (R. 55) stated that the directors of Socal Foundry believed that the taxpayer would be unable to pay the full amount and that it would be “a wise and proper thing” to accept the sum of \$4,000 “in settlement” of the debt, certainly support the trial judge in his appraisal of the evidence. Significant, too, in ascertaining what were the creditor’s motives, is the fact that in its 1944 tax return Socal Foundry claimed a bad debt deduction for the amount which was released. (R. 15, 45.) In reference to this, the court below stated that the taking of this deduction (R. 21):

also fits into this pattern. They all spell clearly the compromise of a debt by the acceptance of a smaller sum.

In all cases of this character, the contemporaneous acts of the parties performed at the time when the effect of the transaction on tax liability was not uppermost [^] [sic] in their minds should prevail over subsequent attempts to give to it a different interpretation. * * *

The taxpayer’s attempts to minimize the effect of this by pointing to the fact that Socal Foundry received no tax benefit from the deduction. (Br. 27.) This, however, serves to confirm, rather than to detract from the significance of the matter. Since the deduction gave Socal Foundry no tax benefit, there would have been no possible reason for it to misrepresent the situation in

its tax return. Consequently, the deduction represents an unbiased insight into how Socal Foundry, the alleged donor, viewed the matter at that time. The fact of the deduction demonstrates that Socal Foundry did not consider that it made a gift, but that it did, as the court below held, settle or compromise an indebtedness which was uncollectible in full. In the final analysis, Socal Foundry's intent is decisive of whether it intended to make a gift.

The taxpayer (Br. 18) also points to the financial statements as showing that the taxpayer was actually solvent at the time (R. 54), and as being inconsistent with the conclusion that the parties were settling an uncollectible debt. But there is nothing in the record which would compel the conclusion that this information was then available to the parties or that they acted on it. Furthermore, it does not negate the lower court's conclusion that the parties compromised the matter because there may have been some dispute concerning the existence of the whole claim.

Th taxpayer's entire argument on this point (Br. 11-20) seems to be that the trial court should have disregarded all the positive evidence on which it relied and, instead, should have accepted the somewhat contradictory testimony of Sweeney, Sheedy's attorney, to the effect that no compromise of an indebtedness was involved. We do not at all concede that the trial judge, who saw and heard the witness, could be compelled to accept this testimony, particularly since it contradicted the written instruments and contradicted the fact that Socal Foundry considered that it was entitled to a bad debt deduction. *Ruud v. American Packing & Provi-*

sion Co., *supra*, pp. 540-541. See also *Quock Ting v. United States*, 140 U. S. 417, 420-421; *Andrew Jergens Co. v. Connor*, 125 F. 2d 686, 689 (C.A. 6th). However, it should be pointed out that his testimony, even if it should be given full credence, does not begin to establish any basis for the taxpayer's contention that it was the recipient of a gift from Socal Foundry. Indeed, his testimony is to the contrary for he stated that Socal Foundry's release of the claim for \$4,000 was part of the "consideration" for the sale of the stock and that this motive did "transmute itself to Socal Foundry." (R. 33.) Since he was one of the directors of Socal Foundry when it adopted the resolution (R. 34), his testimony is absolutely inconsistent with the existence of any donative intent on the part of Socal Foundry. And, despite the various convolutions by which the taxpayer seeks to impute Sheedy's motives to Socal Foundry at a time when Sheedy was no longer connected with it (Br. 14-16, 17-18, 20), there is not one particle of evidence, and none is pointed to by the taxpayer, that Sheedy intended that Socal Foundry should make a gift. Indeed, the very testimony on which the taxpayer relies, namely that the release of the obligation was part of the consideration for the sale of the stock, shows that the contrary was true. Thus, even if the trial court should have accepted this testimony to the exclusion of everything else in the record, and even if the taxpayer could somehow impart Sheedy's motives to Socal Foundry, there would still be no basis for the taxpayer's culminating assertion that (Br. 20) "this forgiveness, made for that purpose, was a gift by Foundry, which

purpose generated from its sole stockholder.”

We submit that the trial court’s view of the evidence is the proper one and shows that there was a settlement of an indebtedness, not a gift. We also submit that, no matter how else the evidence be appraised, there is no possible basis for concluding that Socal Foundry intended to make a gift to the taxpayer when it accepted a lesser amount in payment of the indebtedness.

The taxpayer advances what purports to be two alternative arguments, but which, on analysis, really come down to the same basic contention, namely, that Sheedy made an indirect capital contribution to the taxpayer in the amount of the debt which was forgiven by Socal Foundry. (Br. 21-28.) Before considering this argument, it should be emphasized that the taxpayer’s theory of a capital contribution by Sheedy is completely inconsistent with the first alternative argument, namely, the taxpayer (Pet. Br. 11-20) was the recipient of a gift from Socal Foundry.

Although the taxpayer does not state its argument in ultimate terms, it will readily be appreciated that the taxpayer must be contending that the situation should be viewed the same as though Socal Foundry had assigned its claim against the taxpayer to Sheedy, who then forgave the indebtedness to the taxpayer as a contribution to its capital, or as though Sheedy had sold his stock to Gaines, not for \$42,000 in cash, but for \$77,335.07 (\$42,000 plus \$35,335.07), and that Sheedy then contributed \$35,335.07 to taxpayer’s capital to enable it to pay off its indebtedness in full to Socal Foundry.

The court below, we believe, answered this contention correctly by saying (R. 21-22) :

If, as plaintiff contends, the effect of the transaction is as though the \$35,335.07 had been added to the price demanded by Sheedy for the transfer of the stock, and, after receiving it, Sheedy had donated it to the plaintiff, the answer is that the transaction was not handled in that manner. And, neither Sheedy nor Gaines, contemporaneously, treated it as such. But even if we assume that this was the intention, their actions evidence a contrary intention. And, as between the two, in a matter of this character, acts speak more eloquently to a court.

The transaction, quite clearly, was not handled in the altogether different manner in which the taxpayer now suggests the parties might have proceeded. The fact that they did not carry out their transaction in this other way is, as the court below observed, strongly indicative that such was not their intent. And, of course, whether the transaction was a compromise of an indebtedness, a gift of income by Socal Foundry, or a capital contribution by Sheedy, largely depends on the intention with which the parties acted. Furthermore, even though the ultimate tax consequences here involved might have been different if the parties had consummated a different transaction, that does not constitute a reason for avoiding the tax consequences which attend the transaction which the parties did carry out. *Founders General Co. v. Hoey*, 300 U. S. 268, 275; *United States v. Cumberland Pub. Serv. Co.*, 338 U. S. 451, 455-456; *Frederick Smith Enter. Co. v. Commis-*

sioner, 167 F. 2d 356, 361-362 (C.A. 6th); *Becker v. Bank of Commerce Liquidating Co.*, 102 F. 2d 633, 638 (C.A. 8th), certiorari denied, 308 U. S. 578; *Biddle Avenue Realty Corp. v. Commissioner*, 94 F. 2d 435, 437 (C.A. 8th); *Taft v. Commissioner*, 92 F. 2d 667, 669 (C.A. 6th), affirmed, 304 U. S. 351.

In this connection, it is important to observe that the tax liabilities of the other parties would have been different if they had carried through the other transaction to which the taxpayer attempts to assimilate this one. Thus, Socal Foundry would not have been entitled to a bad debt deduction if the taxpayer's indebtedness had been fully paid. Furthermore, if Sheedy had received \$77,335.07 for his stock, instead of \$42,000, the taxable consequences to him might have been different.

The fact remains that Socal Foundry, not Sheedy, was the creditor and released part of the claim. The Court below, we submit, properly held that the taxpayer did not receive a capital contribution from Sheedy when Socal Foundry accepted \$4,000 in full payment of the taxpayer's debt. Socal Foundry, not being a stockholder of the taxpayer, quite obviously did not make any capital contribution to the taxpayer. And Sheedy, the sole stockholder, released nothing to the taxpayer and he could not make a contribution to its capital.

One final matter should be mentioned. Part of the deficiency in this case arose from the fact that the Commissioner had determined that taxpayer had erroneously included in its equity invested capital for the period of November 20 to December 31, 1944, a proportionate part of the \$35,335.07 released by Socal Foun-

dry. (R. 5, 28, 68, 71, 75.) If, as the court below held, the taxpayer was in receipt of taxable income as a result of the transaction, it was correct in holding that there was no increase in taxpayer's invested equity capital in 1944 (R. 28) for the income, at most, would be reflected in the taxpayer's earnings and profits account and would not appear in equity invested capital until the beginning of the next taxable year. Section 718(a)(4), Internal Revenue Code (Appendix, *infra*). The taxpayer has made no assignment of error in this respect. Furthermore, even if the taxpayer were correct in contending that there was a gratuitous forgiveness of indebtedness by Socal Foundry, or a forgiveness of indebtedness by Sheedy which amounted to a contribution to capital, there would be no basis for claiming any increase in equity invested capital. *Carlisle Tire & Rubber Co. v. Commissioner*, 168 F. 2d 816 (C.A. 3d); *George Hall Corp. v. Shaughnessy*, 67 F. Supp. 748 (N.D. N.Y.); *Liberty Mirror Works v. Commissioner*, 3 T.C. 1018; *Doylestown & Eastern Motor Coach Co. v. Commissioner*, 9 T.C. 846.

CONCLUSION

In view of the foregoing, the judgment of the District court should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

HILBERT P. ZARKY,

Special Assistants to the Attorney General.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL,

EDWARD R. McHALE,

Assistant United States Attorneys.

MARCH, 1950.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" include gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income*.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(3) [As amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 111 (a)] *Gifts, Bequests, Devises, and Inheritances*.—The value of property acquired by gift, bequest, devise or inheritance. There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 718. [As added by Section 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. EQUITY INVESTED CAPITAL.

(a) *Definition*.—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

* * * * *

(4) *Earnings and Profits At Beginning of Year*.—The accumulated earnings and profits as of the beginning of such taxable year;

* * * * *

(26 U.S.C. 1946 ed., Sec. 718.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(a)-13. *Cancellation of Indebtedness*.—(a) *In General*.—The cancellation of indebtedness, in whole or in part, may result in the realization of income. If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt, income in the amount of the debt is realized by the debtor as compensation for his services. A taxpayer realizes income by the payment or purchase of his obligations at less than their face value. (See section 29.22(a)-17.) In general, if a shareholder in a corporation which is indebted to him gratuitously forgives the debt, the transaction amounts to a contribution to the capital of the corporation to the extent of the principal of the debt.

* * * * *

Sec. 29.22(a)-16. *Contributions to Corporation by Shareholders.*—If a corporation requires additional funds for conducting its business and obtains such needed money through voluntary pro rata payments by its shareholders, the amounts so received being credited to its surplus account or to a special capital account, such amounts will not be considered income, although there is no increase in the outstanding shares of stock of the corporation. The payments under such circumstances are in the nature of voluntary assessments upon, and represent an additional price paid for, the shares of stock held by the individual shareholders, and will be treated as an addition to and as a part of the operating capital of the company. (See sections 29.22(a)-13 and 29.24-2.)

Sec. 29.22(b)(3)-1. *Gifts and Bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is not includible in gross income, although the income from such property is includible in gross income. If the gift, bequest, devise, or inheritance is of income from property, it is not to be excluded from gross income. An amount of principal paid under a marriage settlement is a gift. As to alimony or an allowance paid upon divorce or legal separation, see section 29.22(k)-1.

No. 12,436

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC MAGNESIUM, INC. (formerly Socal Magnesium,
Inc.),

Appellant,

vs.

HARRY C. WESTOVER, Individually and as Collector of
Internal Revenue for the Sixth District of California,

Appellee.

REPLY BRIEF FOR THE APPELLANT.

FILED

APR 10 1950

PAUL P. O'BRIEN,

CLERK

MELVIN D. WILSON,

819 Title Insurance Building, Los Angeles 13,

Counsel for Appellant.

No. 12,436

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC MAGNESIUM, INC. (formerly Socal Magnesium,
Inc.),

Appellant,

vs.

HARRY C. WESTOVER, Individually and as Collector of
Internal Revenue for the Sixth District of California,

Appellee.

REPLY BRIEF FOR THE APPELLANT.

The lower court, by taking a myopic view of the case, has overlooked the controlling facts, and has decided the case on extraneous or subordinate facts. The appellee's brief tries to perpetuate that error.

The one fact which overshadows all others and should control the decision, is that Mr. Sheedy, who owned all the stock of the debtor and creditor corporations (appellant and Foundry, respectively) arranged, by an enforceable contract, to have the creditor corporation gratuitously cancel \$35,335.07 of the debt owing by appellant. This forgiveness was positively to be made without any opportunity for the two corporations, or the new owner of Foundry, to negotiate about the amount of the debt, or the ability of the debtor to pay it.

After this contract was signed, appellant would certainly not think of paying any of the \$35,335.07, as Gaines indemnified appellant against paying any of said amount. Consequently, it made no accord and satisfaction of *said* amount, by paying \$4,000.00 on a larger debt, or otherwise.

After the contract was signed, Foundry could not hope to collect any of the \$35,335.07 from appellant, as Foundry's sole stockholder Sheedy, had caused Foundry to give up said claim.

After the contract was signed, Gaines could not hope to have Foundry collect the \$35,335.07 from appellant or Sheedy, because Gaines had not paid for said account, and had agreed that it would be taken out of Foundry.

After Gaines became the stockholder of Foundry, all that the new Board of Directors of Foundry could do, respecting appellant's debt, was to rubber-stamp the deal that had been made; a deal that Foundry, without consideration, would dispose of an asset which Gaines did not buy, and which Sheedy wanted transferred to appellant. The new Board of Directors of Foundry had to approve this deal, though they knew that appellant owed \$39,335.07, and had sufficient assets to pay the account in full. They knew that Foundry was making a gratuitous transfer of \$35,335.07 to appellant, because Foundry's sole stockholder directed it to do so.

The above are the controlling facts, and lead to only one conclusion—that Foundry made a gift to appellant because Sheedy wanted it to; or that Sheedy contributed capital to appellant, indirectly through Foundry, or directly by a contract made for appellant's benefit.

The lower court's conclusions are insupportable, when the contract is fully considered.

When the full force of the contract is considered, the trial judge's finding and conclusions, are seen to be excuses for an erroneous conclusion, rather than sound and logical conclusions from the one dynamic fact in the case.

In amplification of the above points, the appellant wishes to center attention on three facts which have been definitely agreed to between the parties, but which the lower court, and now the appellee, chose to regard as in doubt.

The first fact which has been agreed to, but which the lower court and appellee are treating as in dispute, has to do with the amount of indebtedness from appellant to Foundry.

The balance sheet of appellant at October 31, 1944, taken from its books, shows that it owed Foundry \$39,335.07. This balance sheet appeared as Exhibit 2 of the Stipulation of Facts, Record 44 and 54. P. H. Sheedy was president and a director of both companies and obviously was familiar with the books and the inter-company accounts.

Record 50 states that "Mr. Gaines acknowledges that he has been given full opportunity to inspect the books and records of Socal Foundry. * * *" Therefore, he was familiar with the inter-company accounts also.

The contract [Appellant's Ex. 1] stated that the inter-company debt from appellant to Foundry was in the approximate amount of \$39,335.07. [Record 48.]

The parties hereto, after investigating the matter, entered into a stipulation that the actual debt from appellant to Foundry at November 20, 1944, was \$39,335.07 [Record 43.]

The Findings of Fact signed by the District Judge stated that the inter-company debt was \$39,335.07 as of November 20, 1944. [Record 27.]

The debtor and the creditor corporation were wholly owned by the same man, P. H. Sheedy, and there could be no ground for dispute between the two corporations as to the amount of the debt.

Still the lower court bases its conclusion of an accord and satisfaction in settlement of an *uncertain* amount on the following phrase in the contract: "Whereas Socal Foundry claims that Socal Magnesium, Inc., is indebted to it in the approximate amount of \$39,335.07, * * *" In the same contract in clause D a definite amount is stated as follows: "To cause Socal Foundry to compromise and settle its claim against Socal Magnesium, Inc., in the aforesaid amount of \$39,335.07, * * *"

In spite of this certain evidence and stipulation and findings of fact and book records to the effect that the amount owing from appellant to Foundry was \$39,335.07, the court below seized upon words in the preamble to the contract, which was the only place in the entire record where any uncertainty as to the amount appears, and bases his conclusion of accord and satisfaction on it and ignores the important part of the contract which required Gaines to cause Foundry to forgive most of the debt regardless of its collectibility and regardless of its amount, and without opportunity for negotiation between the debtor and creditor.

The second settled fact which the lower court and appellee chose to treat as being uncertain, is the matter of appellant's solvency on November 20, 1944.

Here again the books of appellant showed that as of October 31, 1944, it had assets costing \$110,179.86 and

liabilities, exclusive of the debt to Foundry, of \$41,-877.14. This left assets of \$68,302.72 available to pay Foundry's debt of \$39,335.07. [Record 54.]

There is a presumption in law that appellant was solvent both before and after the cancellation of the indebtedness. (*Hasenjeager v. Voth*, 91 Cal. App. 394, 267 Pac. 146.) The court may rest assured that if appellant had been able to show that it was insolvent before and after the cancellation of the indebtedness on November 20, 1944, it would have introduced evidence to that effect.

The lower court in its finding No. 2 [Record 26, 27] held that appellant was solvent and had a clear net worth both before and after November 20, 1944. The judge refers to this in his statement of facts in his opinion.

In spite of the above positive evidence that appellant was solvent both before and after the cancellation of indebtedness, the lower court and the appellee chose to imply that the Foundry could not have collected the full debt, and that it had a loss from a bad debt, and that Foundry collected all it could from appellant, and did not cancel some of the debt "for nothing."

The lower court bases its position as to the doubtfulness of the collectibility of the debt upon the resolution adopted by Foundry at the time it made the forgiveness. In that resolution it stated: "Whereas it is the belief that the directors of this corporation that said Socal Magnesium, Inc., is unable to pay its said debt. * * *"

Now when Foundry was bound from a practical standpoint by the contract between Sheedy and Gaines to make the forgiveness, its directors had to make some statement in their minutes and this is the obvious thing they would say. Of course, it is a fact that appellant did not have sufficient cash or liquid assets to pay the debt, but it did

have sufficient assets to pay the debt, although it would have had to liquidate its capital assets to do so. Insolvency has two definitions, (1) the inability to pay its current debts, and (2) an excess of liabilities over assets. The lower court has found, as shown by the books, that appellant was not insolvent in the second sense, which is the meaning attributed to the word "insolvency" in connection with income tax cases involving forgiveness of indebtedness.

A third fact which is clearly established by the record but which the court below and the appellee chose to treat as unsettled, is whether Foundry and appellant were free to, and did negotiate for the payment or settlement of the inter-company account. The court below and the appellee chose to consider that there was an opportunity for a negotiation between the debtor and the creditor, both as to the amount of the account and as to the ability of the debtor to pay, and that the creditor collected all it could, and wrote off the balance as a bad debt.

The court below and the appellee chose to ignore, in this respect, the compelling force of the agreement between Sheedy and Gaines, wherein, before Gaines ever had any rights in the matter, he was required to agree that he would cause Foundry to gratuitously cancel the \$35,335.07 debt, as consideration for the reduction of the purchase price of the stock of Foundry.

It is abundantly clear that the \$35,335.07 debt was cancelled by Foundry, not because it could not collect any more nor because it had to compromise a claim for an uncertain amount, but because Sheedy required it do so while he still had control of Foundry.

The lower court held that Foundry was free to and did negotiate a settlement of its claim against appellant for

all that it could get, and wrote off the balance as a bad debt. The court did not fully appreciate the dynamic and vital fact that by the contract between Sheedy and Gaines, Sheedy, while still in control of Foundry, required that it cancel \$35,335.07 of the debt against appellant "for nothing" in order to improve the financial condition of appellant, and hence did not see that this was a gift from Foundry, at the instance of Sheedy.

On page 12 of his brief, appellee finally recognizes that the cancellation by Foundry of the largest part of the debt, was caused by the contract between Sheedy and Gaines. Of course, appellee tries to argue that since the forgiveness of the debt by Foundry was part of the consideration for the sale of the stock, there was no gratuitous cancellation of the debt by Foundry.

But here, though appellee appears not to recognize it, he gets trapped in the point relied on by the court below, that the stockholders and the corporations are separate entities.

It is true that part of the consideration which Sheedy received for the sale of the Foundry stock to Gaines, was that Foundry would forgive \$35,335.07 of the debt owing to it from appellant. It is true that Foundry suffered a detriment; it gave up a collectible, valid claim, for nothing. This was a gratuity and amounted to a gift, and was so intended by Sheedy, and hence by Foundry.

Since Foundry received nothing for that forgiveness, and Foundry did not receive its own stock transferred from Sheedy, then who really did suffer the detriment which was imposed on Foundry? Did Gaines suffer by the cancellation? Did he buy the stock of Foundry thinking that the claim against appellant was good, and then find disappointment in learning that the account was not fully col-

lectible? No! He paid \$35,335.07 less for the stock of Foundry than he would have, if he had expected to collect that claim from appellant.

Who then did suffer for the detriment sustained by Foundry? Obviously, it was Sheedy, who wanted it to be done and who reduced the selling price of his Foundry stock by \$35,335.07. He did this so as to benefit appellant.

The fact, then, that the cancellation by Foundry was part of the consideration received by Sheedy for the sale of his stock, does not prove that Foundry received consideration for the cancellation. On the contrary, since Foundry did not receive any part of the stock or any other consideration, it shows that the cancellation by Foundry, as compelled by the contract, was gratuitous and was a transfer to appellant of something for nothing.

Appellee argues on page 11 of his brief that Foundry's intent was decisive as to whether it intended to make a gift. That is true, but again we go back to the question, "Who caused Foundry to make the gift?" Was it Sheedy or was it Gaines? After Gaines came into ownership of the stock of Foundry, did Foundry have a free opportunity to collect all that was owing to it, or was it bound by a pre-existing contract, made before or at the time Sheedy sold the stock, by which the latter decreed that the forgiveness would be made under certain specified terms and without any opportunity for further negotiation?

Of course, the latter is true. After Gaines obtained possession of the Foundry stock, neither he nor Foundry had any opportunity to negotiate with appellant as to the inter-company debt, but they were bound to cancel \$35,335.07 of the debt, although it was fully collectible and was certain in amount.

Appellee also argues on page 11 of his brief that since Foundry received no tax benefit from writing off the amount as a bad debt, this represents its unbiased insight as to its views of the matter at the time.

Stipulation [Record 45] is to the following effect:

“It is further stipulated that Socal Foundry had a loss for 1944, after the allowance of net operating loss carrybacks, as permitted under the provisions of Section 23(p) and 122 of the Internal Revenue Code, * * *

In other words, it was not until after the 1945 or later year returns were filed and net operating loss carrybacks developed that Foundry knew that it would have no taxable gain or income for 1944. Consequently, at the time the 1944 return of Foundry was filed, Gaines hoped to get a tax benefit by writing off the forgiveness of appellant's claim as a bad debt.

The lower court, in its opinion [Record 20] states:

“The actions of both corporations following the execution of the contract fit into the idea of compromise of a claim. Plaintiff cannot disclaim for itself or Sheedy what Socal did after the agreement was entered into, for the subsequent acts were necessary in order to protect the plaintiff and Sheedy and to give effect to the undertaking made by Gaines.
* * *

Now the lower court did not state what action appellant had taken which fitted into the idea of a compromise of a claim. It is true that appellant cannot disclaim Foundry's action, taken in compliance with the contract, of cancelling the \$35,335.07 debt.

But beyond that, appellant did nothing which fitted into the idea of an arm's length compromise of a claim. It did not approve of Foundry's effort to get a bad debt deduction, nor did it have any responsibility for the language of the resolution adopted by Foundry's new Board of Directors.

The appellee argues on page 11 of his brief, that Sweeney's testimony contradicted the written word. Sweeney's testimony did not contradict the written instrument. It explained the motives activating Sheedy to require Foundry to make the forgiveness.

It is true that Sweeney's testimony contradicted the fact that Foundry considered that it was entitled to a bad debt deduction, but appellant is not bound by what Foundry, in the hands of Gaines, did after the debt was forgiven. The contract did not specify how Foundry was to treat the matter in its returns and did not prohibit it from claiming a bad debt deduction, but the deduction was an idea of Gaines and probably an afterthought. In any event, neither appellant nor Sheedy participated in that action and neither should be bound by it. The stipulated facts and the court's findings show that Foundry could not have had a bad debt loss.

Since Sweeney's testimony did not contradict the written instruments which Sheedy and appellant entered into, and do not contradict anything that Sheedy or appellant did, and since there was no evidence introduced by the appellee which disputed Sweeney's testimony and since his testimony was not clouded up on cross-examination, it should be accepted.

The Supreme Court has said that the forgiveness of a debt is either income or a gift, dependent upon the intent of the creditor. Sweeney testified to the motives actuating

the creditor; namely, that Foundry gratuitously forgave the debt because its sole stockholder, Sheedy, wanted it to do so, in order to benefit appellant.

On page 12 of his brief, appellee says that there is no evidence that Sheedy intended Foundry to make a gift. But the testimony showed that Sheedy wanted to improve appellant's financial condition and that he caused Foundry to forgive, without consideration flowing to Foundry, a certain and fully collectible debt of \$35,335.07. This constitutes positive evidence that Foundry intended to make a gift to appellant of \$35,335.07.

On page 15 of his brief, appellee in arguing that there was no capital contribution to appellant by Sheedy, states that Sheedy released nothing to appellant and hence could not make a contribution to its capital.

Appellee ignores appellant's argument, made in its opening brief, that Sheedy made a contract with Gaines for the benefit of a third person, namely appellant, and that such contract was enforceable by appellant, and was worth \$35,335.07 to appellant and that appellant realized that amount therefrom. This was a *direct* gift from Sheedy to appellant and constituted a capital contribution from Sheedy to appellant. The appellee chose not to answer this argument, as it shows a direct contribution from the sole stockholder of appellant to it of a contract right which was worth \$35,335.07.

In summary, it is requested that the court find that Sheedy, while in control of Foundry, caused it to gratuitously forgive a certain, collectible, debt against appellant, for the purpose of benefiting appellant and that this amounted to a gift from Foundry to appellant. It is requested that the court find in the alternative, that Sheedy made a capital contribution to appellant, either indirectly,

as sole stockholder of Foundry, or directly by transferring to appellant an enforceable contract right which brought to appellant \$35,335.07.

The appellant believes that the District Court surely erred in treating the \$35,335.07 item as taxable income to appellant and that the decision should be reversed.

Dated at Los Angeles, California, this 7th day of April, 1950.

Respectfully submitted,

MELVIN D. WILSON,

Counsel for Appellant.



